Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Petitioner,

v.

HON. FRANK G. VOLLOR,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Mississippi

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a temporary injunction barring the broadcast of advertisements because they mention a political candidate violate the First Amendment to the United States Constitution?

2. Does the First Amendment standard of "express advocacy" as defined in *Buckley v. Valeo* and *FEC v. Massachusetts Citizens for Life* require words that expressly advocate the election or defeat of a clearly identified candidate?

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States was incorporated in the District of Columbia in 1916. It is a non-profit, non-stock corporation, exempt from taxation under I.R.C. § 501(c)(6).

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The Chamber of Commerce of the United States of America ("Chamber") respectfully petitions for a writ of certiorari to review the November 3, 2000, Judgment of the Supreme Court of Mississippi that refused to stay the November 3, 2000, Order Granting Plaintiffs' Motion for Temporary Restraining Order ("TRO") against the Chamber's political speech.

OPINIONS AND ORDERS BELOW

The Order of the Mississippi Supreme Court (No. 2000-M-01839) is at Appendix ("Pet. App.") 1a. The Temporary Restraining Order of the Chancery Court of the First Judicial District of Hinds County, Mississippi (No. G-2000-2128 S/2) is at Pet. App. 2a. The stays issued by Mr. Justice Scalia are at Pet. App. 5a-7a. The November 2, 2000, Memorandum Opinion and Order of the United States District Court for the Southern District of Mississippi in *Chamber of Commerce of the United States of America v. Moore* (No. 3:00-cv-778WS) is at Pet. App. 8a. None of these opinions is officially reported.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a) (2000).

The Petition Is Timely

Both the Mississippi Supreme Court and the Hinds County Chancery Court entered their orders on November 3, 2000.

The Petition Presents A Live Controversy

Respondent obtained the TRO at issue here on November 3, 2000, for the purpose of suppressing speech until the election on November 7. The four days from November 3 to November 7 was not enough time for orderly review of the merits. This timing is not unusual. The type of prior restraint granted here naturally tends to be sought toward the

end of a campaign. But even if a restraint were sought months prior to an election, orderly pre-election review would seldom, if ever, be practical.[1] The Chamber expects to engage in similar speech during future elections in Mississippi and elsewhere. Thus, it will remain exposed to the same type of orders challenged here.

In short, this is a classic example of a case that is "capable of repetition, yet evading review." *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). In such a situation where "the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration" and "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again," this Court will grant review despite traditional jurisdictional constraints. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *see also Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

The Petition Challenges A Final Ruling

The petition here challenges a final judgment.[2] The November 3 TRO gave Plaintiff all the relief he sought (suppression of the Chamber's speech until after the

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[1] This Court has held, for example, that the typical human gestation period is too short to allow orderly review on the merits by this Court. *Roe v. Wade*, 410 U.S. 113, 125 (1973).

[2] *See* 15A Charles Alan Wright, et al., *Federal Practice and Procedure*, § 3912 at 449-50 (2d ed. 1992) ("[I]f suit is brought solely for the purpose of obtaining short-term injunctive relief, an order granting a temporary restraining order may be found appealable as a final judgment on the ground that it has effectively granted all the relief sought in the action"); 13 James Wm. Moore, *Moore's Federal Practice* § 65.41 (3d ed. 1997) ("the issue of appealability is not limited by the trial court's terminology"; "when the grant or denial of a temporary restraining order may dispose of the action for injunctive relief, the grant or denial has been held appealable").

November 7 election), and the Mississippi Supreme Court's denial of a stay assured that the TRO would have its full effect unless this Court intervened.

In prior restraint cases, this Court has taken a pragmatic approach regarding finality. For example, in *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam), a lower state court had enjoined a parade and the Illinois Supreme Court had denied a stay. This Court treated an application for a stay of a temporary injunction entered by the Cook County Circuit Court as a petition for certiorari and granted review, finding practical finality with respect to the speech restriction because "the outstanding injunction will deprive [the parade organizers] of rights protected by the First Amendment during the period of appellate review." *Id.* at 44. Likewise, in *Local No. 438 Construction and General Laborers' Union v. Curry*, 371 U.S. 542 (1963), this Court held final and reviewed a preliminary injunction against picketing. *See also Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (reviewing a temporary injunction issued by an Illinois circuit court and upheld by an Illinois appellate court where the Illinois Supreme Court denied a motion for leave to appeal); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (Court review of a press gag order that had been modified and remanded by the Nebraska Supreme Court).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I.

The Fourteenth Amendment to the United States Constitution forbids any State to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" or to "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Mississippi Code Annotated Section 23-15-801 (2000) defines various terms used in Mississippi's election laws. It defines an "Expenditure" as

> any purchase, payment, distribution, loan, advance, deposit, gift of money or anything of value, made by any person or political committee for the purpose of influencing any balloted measure or election for elective office . . . .

Miss. Code Ann. § 23-15-801(f)(i) (2000). The phrase "for the purpose of influencing" also is used in the definition of a "Political Committee," § 23-15-801(c), and of "Contribution," § 23-15-801(e)(i).

Section 23-15-801(j) defines "independent expenditure" as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate."

Section 97-13-15 defines "Prohibited political contributions by corporations." It forbids "any corporation, incorporated company, or incorporated association" to "give, donate, appropriate or furnish directly or indirectly, any money, security, funds or property . . . in excess of One Thousand Dollars ($1,000.00) per calendar year for the purpose of aiding any political party or any candidate for any public office."

Section 23-15-1021 establishes "Judicial office donation limits." It makes it

> unlawful for any individual or political action committee . . . to give, donate, appropriate or furnish directly or indirectly, any money, security, funds or property in excess of . . . Five Thousand Dollars ($5,000.00) for the purpose of aiding any candidate or candidate's political action committee for judge of the Court of Appeals or justice of the Supreme Court.

The Mississippi statutes empower the Secretary of State to assess civil penalties for violations. § 23-15-813. The Attorney General is authorized to enforce such assessments. *Id.* Also, criminal penalties are possible. §§ 25-15-811, 97-13-17.

Relevant portions of the Mississippi election statutes appear at Pet. App. 37a.

STATEMENT OF THE CASE

This case involves the first of four Mississippi state court injunctions that barred the public broadcast of certain Chamber advertising just before the November 7, 2000, election. The four injunctions all were issued in reliance on a U.S. District Court ruling stemming from the following events.

Facts Leading to TRO #1

The November 7, 2000, Mississippi election included races for four seats on the Supreme Court of Mississippi. The Chamber, a non-profit organization that represents business interests in dealing with all branches and phases of government, produced several television advertisements that it aired during the three weeks before the election. These advertisements addressed issues and qualifications of candidates, but did not contain any explicit words advocating electoral action.

Shortly after the Chamber began running its ads, Mississippi Secretary of State Eric Clark wrote to Mississippi Attorney General Michael Moore asking him to take action against the Chamber's ads under Mississippi's election statutes. Seeking to clarify the legal situation, the Chamber brought an action in the United States District Court for the Southern District of Mississippi, *Chamber of Commerce v. Moore* (Pet. App. 8a). The action named Attorney General Moore and Secretary of State Clark as defendants. It sought a

declaration that the Chamber's ads did not include express advocacy and, hence, were not subject to the Mississippi statute.[3] Defendants argued in response that Mississippi election law applied on the sole theory that the Chamber's ads "expressly advocate the election of the favored candidates for the four Mississippi Supreme Court seats," (Pet. App. 9a-10a) and thus were "'independent expenditures' subject to the reporting requirements" of Mississippi law. (Pet. App. 12a).

On November 2, 2000, United States District Court Judge Henry T. Wingate issued a Memorandum Opinion and Order in the Chamber's declaratory judgment action ("*Moore*"). Judge Wingate explained that the Chamber's ads were independent speech, there being "no proof whatsoever of any collaboration between the Chamber and the candidates involved in the advertisements." (Pet. App. 9a). Judge Wingate also did not find any explicit language advocating electoral action. His descriptions of the ads appear at Pet. App. 14a-16a.

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[3] Mississippi law imposes registration and disclosure requirements on organizations that make "independent expenditures." Miss. Code Ann. §§ 23-15-803 & 23-15-807 (2000). Such independent expenditures must be "expressly advocating the election or defeat of a clearly identified candidate." *Id.* § 23-15-801(j). Mississippi law also restricts corporate expenditures made "for the purpose of aiding any political party or any candidate for any public office." *Id.* § 97-13-15. This statutory framework is very similar to the language in the Federal Election Campaign Act that this Court held applicable only to speech that "in express terms advocate[s] the election or defeat of a clearly identified candidate" by using language such as "vote for" or "elect" or "defeat." *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (per curiam). The defendant state officials acknowledged that Mississippi's election statutes apply only to "express advocacy." They argued, however, that the Chamber's ads were express advocacy because they clearly implied support of or opposition to particular candidates.

Despite the absence of explicit language, Judge Wingate ruled for Defendants, holding that the Chamber's ads fell within a "Broader Interpretation" of express advocacy. (Pet. App. 23a, 30a-32a). He held that the Chamber advertisements "offer thinly veiled exhortations to support the campaigns of the aforesaid candidates, a plain, clever attempt to avoid the reach of Mississippi reporting and disclosure laws by eliminating those words listed at footnote 52 of *Buckley*." (Pet. App. 33a). The Judge acknowledged that his ruling adopted a minority position as to what *Buckley* meant by "express advocacy." (Pet. App. 23a). Judge Wingate's ruling did not become final until he entered judgment on January 23, 2001. (Pet. App. 34a), long after the events described here.[4]

On Friday, November 3, 2000, Judge Frank G. Vollor, one of the candidates for Mississippi Supreme Court Justice, sought a temporary restraining order ("TRO") from the Chancery Court of the First Judicial District of Hinds County, Mississippi. The Chamber's counsel was advised of this fact and summoned to a hearing less than an hour before the motion was to be heard by the Chancellor. The Chamber's counsel did not receive the motion papers until he arrived at the hearing.

Judge Vollor's motion papers attached the *Moore* opinion, asserting that it established that the Chamber's ads were "express advocacy" and, hence, subject to Mississippi's election statutes. (Pet. App. 66a). Judge Vollor offered no evidence beyond that contained in the motion papers. The Chamber's counsel argued, *inter alia*, that the requested injunction violated the First Amendment. (Pet. App. 56a).

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[4] The Chamber is appealing this judgment to the U.S. Court of Appeals for the Fifth Circuit.

Shortly after 4:00 p.m. on Friday, November 3, the Chamber's counsel received the Order Granting Plaintiffs' Motion For Temporary Restraining Order ("TRO #1") that is the subject of this petition. (Pet. App. 2a). TRO #1 enjoined both the Chamber and several television stations that had carried Chamber ads. The theory of TRO #1 was that Chamber television advertisements concerning the election were express advocacy and, hence, were subject to regulation under Mississippi's election laws. TRO #1 banned

> contracting to transmit or transmitting any television advertisement, which is paid for or produced by the Chamber of Commerce of The United States of America, its agents, servants, or employees, concerning the Central District election for the Supreme Court of Mississippi between Jim Smith and Frank G. Vollor.

(Pet. App. 4a). The enjoined stations ceased broadcasting the ads. *See* The Associated Press, *Court Lifts Ban on U.S. Chamber Ads*, Nov. 7, 2000, *available at* 2000 WL 29038411.

The November 3 TRO provided that it would remain effective for 10 days, well past the November 7 election. Because counsel for the Chamber had been heard before TRO #1 issued and the Chancellor had been advised of the Chamber's key defenses before he ruled, there was no prospect of reconsideration before November 7. Thus, at the trial court level, Plaintiff Vollor had obtained all of the relief he sought.

Appeals, Additional TROs, And Motions To Stay

TRO #1 was issued on a Friday afternoon, less than an hour before the Mississippi Supreme Court was to close for the weekend. With only minutes to spare, the Chamber filed emergency papers asking the Mississippi Supreme Court to stay and grant interlocutory review of TRO #1. The Chamber's papers contended that TRO #1 violated the First Amendment. (Pet. App. 52a).

At approximately 6:00 p.m. the Mississippi Supreme Court "denied" the stay application as "without merit." (Pet. App. 1a). The denial left the TRO in effect until after the election. Thus, the Mississippi Supreme Court ruling gave Plaintiff all the relief his papers sought.

The Chamber's counsel immediately contacted the staff of this Court by telephone to alert them that an application for emergency stay was being prepared. The Chamber's November 4, 2000, Motion for Emergency Stay of a Prior Restraint on Political Speech (No. 00A406) was delivered to the Supreme Court on Saturday, November 4. On the morning of Monday, November 6, 2000, Mr. Justice Scalia issued an Order that TRO #1 "is stayed pending the timely filing and disposition of a petition for writ of certiorari." (Pet. App. 5a).

By the time Mr. Justice Scalia granted a stay, two other Mississippi candidates for Supreme Court Justice had persuaded two other Mississippi judges to enter similar orders, one on Saturday, November 4 ("TRO #2"), and the other on Sunday, November 5 ("TRO #3"), forbidding Chamber advertising concerning those candidates. These orders (Pet. App. 57a-61a) were issued without any notice to the Chamber. The new TROs and the applications therefor were not materially different from TRO #1, which the Mississippi Supreme Court had refused to stay. In each case, the application papers relied solely upon the November 2 *Moore* opinion to assert that the Chamber's ads were subject to regulation by Mississippi's election statutes. The stations enjoined by TROs #2 and #3 ceased broadcasting the Chamber's ads.

The Chamber supplemented its stay application to seek relief from those further orders as well. November 5, 2000, Supplement to Motion for Emergency Stay of a Prior Restraint on Political Speech (No. 00A406). At about noon

on November 6, Mr. Justice Scalia issued a further Order staying TROs #2 and #3. (Pet. App. 6a).

On Monday, November 6, after Mr. Justice Scalia had stayed TRO #1, and while the Chamber was seeking relief from TRO #2 and TRO #3, Judge Vollor's counsel went back before the same Hinds County Chancellor who had issued TRO #1. Ostensibly acting on behalf of "William A. Pyle, a citizen of Mississippi," Judge Vollor's counsel applied for a new TRO. (In fact, Mr. Pyle is a lawyer and had assisted Judge Vollor's counsel in an undescribed capacity during the first TRO hearing of November 3. (Pet. App. 54a).) The motion papers confirm that both counsel and the Chancellor were aware of Mr. Justice Scalia's stay of TRO #1. (Pet. App. 76a). Moreover, counsel for the Chamber is informed that the Hinds County Chancery Court independently had been advised of that stay directly by the personnel of this Court. Judge Vollor's lawyer and the Chancellor both knew who was representing the Chamber since he had appeared to oppose issuance of TRO #1. Nevertheless, without giving notice to the Chamber or permitting it any opportunity to be heard, the Chancellor *ex parte* granted another injunction ("TRO #4"), this time to Mr. Pyle. (Pet. App. 62a).

TRO #4 was broader than TRO #1. It was not limited to ads concerning any particular judicial race, but rather covered any ad by the Chamber concerning any of the judicial elections occurring statewide. Nor was TRO #4 limited to the State of Mississippi. In addition to naming the Chamber and all Mississippi television stations, TRO #4 also named and enjoined two television stations in an adjacent state. *Id.*

Upon receipt of TRO #4, the Chamber again supplemented its application for a stay from this Court, November 6, 2000, Second Supplement for Emergency Stay of a Prior Restraint on Political Speech (No. 00A411), and another stay was granted by Mr. Justice Scalia. (Pet. App. 7a). Stations

resumed broadcasting Chamber ads on election day, November 7.

TRO #1 is the only injunction that the Mississippi Supreme Court specifically addressed. Thus, the Chamber directs this petition to TRO #1. However, the three other TROs raise essentially identical issues.

REASONS FOR GRANTING THE WRIT

Certiorari is appropriate here for two reasons. First, certiorari should be granted because state courts, like those below, increasingly have authorized prior restraints, including *ex parte* prior restraints. The injunctions here barred dissemination of political advertising because the speech mentioned a candidate and allegedly violated campaign finance laws. Indeed, four such injunctive restraints were imposed by three Mississippi courts in the week before the November 7, 2000, elections, including the injunction challenged here. One of the orders (TRO #4) was issued in the face of an emergency stay granted by Mr. Justice Scalia as Circuit Justice. Similar injunctions have been granted in past elections by other state courts in Wisconsin and Florida. *See Elections Bd. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721, 725 (Wis.), *cert. denied*, 528 U.S. 969 (1999); *Republican Party of Fla. v. Fla. Elections Comm'n*, 658 So. 2d 653, 653-55 (Fla. Dist. Ct. App. 1995). Unless this Court swiftly and authoritatively affirms First Amendment rights, future election-related advertising will be subject to a proliferation of such prior restraints.

Second, a split has developed among state and federal courts and agencies over the meaning of the First Amendment concept of "express advocacy" that this Court announced in *Buckley*, 424 U.S. at 44 & n.52, and reaffirmed in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"). This Court intended for the express advocacy standard to provide clear and certain guidance as to what

speech is subject to regulation, thus preventing a chill of permissible speech. At this point, however, there is sufficient uncertainty as to the meaning of that standard, as manifested by the TROs, to defeat its purpose. Only this Court can restore the needed certainty.

These two grounds for review are synergistic. The availability of a theory of implied express advocacy tempts litigants and courts to seek even broader prior restraints. The threat of such restraints chills even more speech. The Court should stop the growing practice of injunctions against political advertising. It should also reaffirm that independent speech may be subjected to campaign finance regulation only if it contains explicit language expressly advocating electoral action.

A. Prior Restraints Against Political Speech Are A Growing And Disturbing Practice That Requires This Court's Review

Prior restraints are "the most serious and the least tolerable" form of speech regulation. *Neb. Press Ass'n*, 427 U.S. at 559 (collecting authority). They are strongly presumed to be unconstitutional, even when their goal is to regulate a form of speech that the First Amendment does not protect. *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam) (collecting authority).[5] Where a prior restraint otherwise might be permissible, such as in regulating

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[5] *Freedman v. Maryland*, 380 U.S. 51 (1965), contains criteria applicable to prior restraints. However, Mr. Justice Brennan, the author of *Freedman*, later explained that it "rest[s] upon the proposition that 'obscenity is not protected by the freedoms of speech and press.'" *New York Times Co. v. United States*, 403 U.S. 713, 727 n.* (1971) (Brennan, J. concurring). Following that concurrence, this Court has not applied *Freedman* to speech that categorically is protected by the First Amendment.

obscenity, it may not be imposed until after a final determination that the speech actually is obscene. *Id.*

"Temporary restraining orders and permanent injunctions —i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993), *cert. denied*, 522 U.S. 869 (1997). Political speech lies at the heart of the First Amendment. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). This is equally true whether the speech is express advocacy or something else.

This Court has never sustained an injunction against prospective political speech. In *Buckley* and *MCFL*, however, this Court held that the financing of some political speech pertaining to candidates may be regulated and even prohibited. Those holdings unfortunately have engendered a new willingness to enjoin political speech.

The circumstances that led to TRO #1 and the other injunctions are clear. Busy trial judges were importuned by candidates (fellow judges in Mississippi) with urgent claims that they were being injured by unlawful activity that, if not stopped immediately, would influence an impending election, causing them irreparable injury. The Chamber was from out-of-state and perhaps represented disfavored views. Reassured by *Buckley* and *MCFL* that some political speech is subject to regulation and that, under other authority, the express advocacy standard arguably is flexible, the trial courts granted injunctions even on an *ex parte* basis. As a result, advertising was suppressed at a vital time for political speech, immediately before an election.

The TRO challenged here was not an isolated act. Three different Mississippi judges independently granted three additional TROs against future political speech by the

Chamber. The Mississippi Supreme Court refused to intervene.[6]

Nor were the Mississippi judges the first to grant such injunctions. Comparable prior restraints have been imposed previously in both Wisconsin and Florida. In Wisconsin, two state circuit courts ordered on October 31, 1996, temporary injunctions restraining an organization, WMC Issues Mobilization Council, Inc., from broadcasting its advertisements related to legislative elections to be held on November 5, 1996. *See Wis. Mfrs. & Commerce*, 597 N.W.2d at 725. In Florida, the state Democratic Party sought and received emergency injunctions before the November 8, 1994, election to stop television broadcasts of two political ads purchased by the Republican Party of Florida. A temporary injunction issued from November 2 to November 4 and, after another hearing, from November 4. On December 1, after the election, a Florida circuit judge issued a supplemental temporary injunction after hearing a motion for reconsideration. *Republican Party of Fla. v. Fla. Elections Comm'n*, 658 So. 2d at 653-55. Only belatedly did an appellate Florida court reverse one of these injunctions as "an unconstitutional prior restraint of speech." *Id.* at 653, 657. In sum, such prior restraints are a growing phenomenon.

State courts are not subject to review by the federal courts of appeals. Only this Court can step in and make clear on a national basis that such prior restraints cannot be tolerated, at least in the absence of the most exigent circumstances, such as war or other threat to national security. Certainly such restraints cannot be justified by the alleged violation of regulatory requirements imposed by election law statutes or

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[6] The Chamber's ads directly addressed issues posed by the candidacies of several incumbent Justices of that court.

by claims of injurious falsehood of the type that has always been dealt with by defamation damages, not injunction.

B. The Standard Of "Express Advocacy" On Which The Prior Restraint Rests Is An Important Constitutional Issue On Which Federal And State Courts And Agencies Are Divided

The TROs against the Chamber were issued in reliance on the *Moore* Opinion. That District Court ruling permitted Mississippi regulation of the Chamber's independent speech, even though that speech contained no words of "express advocacy." In so doing, it gave further support to an erroneous position that is undermining the clarity that the express advocacy standard was intended to provide.

Buckley could not have been clearer that, to satisfy the First Amendment's demand for clarity and precision, the express advocacy standard required "express" words advocating electoral action. 424 U.S. at 44 & n.52. *MCFL* explicitly reaffirmed this understanding of *Buckley*. 479 U.S. at 249. Five U.S. courts of appeals have interpreted *Buckley* in light of *MCFL* and all five have demanded explicit advocacy.[7] For example, the Fourth Circuit held in *FEC v. Christian Action Network, Inc.* that:

> The [Supreme] Court opted for the clear, categorical limitation, that only expenditures for communications

---

[7] *Citizens for Responsible Gov't State PAC v. Davidson*, Nos. 99-1414 *et al.*, 2000 WL 1902427 (10th Cir. Dec. 26, 2000); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997); *Maine Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8 (D. Me.), *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997); *Faucher v. FEC*, 743 F. Supp. 64 (D. Me. 1990), *aff'd*, 928 F.2d 468 (1st Cir.), *cert. denied*, 502 U.S. 820 (1991).

> using explicit words of candidate advocacy are prohibited, so that citizen participants in the political processes would not have their core First Amendment rights to political speech burdened by apprehensions that their advocacy of issues might later be interpreted by the government as, instead, advocacy of election result.

110 F.3d at 1051.

Nevertheless, there has been a persistent effort to undermine *Buckley* and to erode the express advocacy standard into something less. Early impetus for this effort came from the Ninth Circuit's opinion *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987). Although that opinion issued several weeks after *MCFL* (with the winter holidays intervening), it did not mention *MCFL*, and opined that explicit language calling for electoral action was not necessary and that "express advocacy" exists if an ad "read as a whole" and in "context" is "suggestive of only one plausible meaning." *Id.* at 864.[8]

When it opposed a petition for certiorari in *Furgatch*, the Federal Election Commission ("FEC") argued that the opinion had no significance in light of *MCFL*.[9] However, after certiorari was denied, the FEC seized on the Ninth Circuit's language, 807 F.2d at 864, and amended its regulations, adding a subsection (b) which provides that "expressly advocating" means:

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[8] This language also was cited by the District Court for the District of Columbia in *FEC v. National Organization for Women*, 713 F. Supp. 428, 434 (D.D.C. 1989).

[9] In opposing a writ of certiorari in *Furgatch*, the FEC represented to the Supreme Court that the Ninth Circuit decision should be ignored in light of the *MCFL* decision. *See Christian Action Network*, 110 F.3d at 1054.

> (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b) (2001). Twice the FEC has been enjoined from enforcing this part of its regulations, but it remains on the books and the FEC never has conceded that it is invalid.[10]

Several state courts either adopted a theory of implied express advocacy or have indicated that it may be viable. For example, the Wisconsin Supreme Court ruled that relying on implications that are made clear by the "context" of speech may well be appropriate. *Wis. Mfrs. & Commerce*, 597 N.W.2d at 733.[11] The Court of Appeals of Oregon similarly looked for the "essential message" in light of "context."

> The purpose is not to search for magic words—which careful drafters can, as in this case, usually avoid—but to find the essential message that the publication

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[10] Subsection (b) was enjoined in *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998), and enjoined nationwide in *Virginia Society for Human Life, Inc. v. FEC*, 83 F. Supp. 2d 668 (E.D. Va. 2000).

[11] The Court elected not to apply the standard in that case because defendants had not been given fair advance notice. *Id.* at 734.

> communicates to the reader. In doing this, the context of the publication—particularly whether or not it came in the midst of a contested election campaign—can play a role in determining how the reader would understand it and, thus, what its message is.

State ex rel. Crumpton v. Keisling, 982 P.2d 3, 10 (Or. Ct. App. 1999) *review denied*, 994 P.2d 132 (Or. 2000).

The November 2, 2000, *Moore* opinion acknowledged that speech like the Chamber's ads "occupies the highest rung of the hierarchy of First Amendment values." (Pet. App. 18a). *Moore* recognized that, in the "fountainhead case" of *Buckley*, 424 U.S. at 44 & n.52, this Court defined the concept of "express advocacy" to require "express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' and 'reject.'" (Pet. App. 18a). *Moore* described the Chamber's ads (Pet. App. 14a-16a), making clear that they contained no such express language. Nevertheless, *Moore* ruled that, viewed in the context of an ongoing election, the ads clearly implied an electoral message and, thus, constituted express advocacy subject to regulation under Mississippi law.

Moore declined to construe *Buckley* and *MCFL* "narrowly" to establish a "bright line" test. Instead, the court adopted (Pet. App. 23a) a "Broader Interpretation" of express advocacy based on *Furgatch* and *MCFL*, as well as opinions in three states, Texas (*Osterberg v. Peca*, 12 S.W.3d 31, 52-53 (Tex.), *cert. denied*, 120 S.Ct. 2690 (2000)), Wisconsin (*Wis. Mfrs. & Commerce*, 597 N.W.2d at 723-24) and Oregon (*Crumpton*, 982 P.2d at 10), and one U.S. district court opinion, *FEC v. Nat'l Org. for Women*, 713 F. Supp. at 443.

According to *Moore*'s "Broader Interpretation," speech that clearly implies support for or opposition to a candidate constitutes express advocacy, even though it includes no explicit words advocating election or defeat of the candidate.

With specific reference to the Chamber's ads, the court held that an ad that portrays a "particular candidate as the person who will use common sense, ensure prompt adjudication of death penalty cases and uphold victim's rights" is not "true issue advocacy" and that "no reasonable viewer would construe the [ad]" as anything but express advocacy. (Pet. App. 31a-32a).

The Mississippi Chancery courts relied on *Moore*. *Moore* also induced the Ohio Elections Commission four days later on November 6, 2000, to reverse ground and hold that explicit language is not necessary to constitute express advocacy. In explaining the change in his vote—which was the deciding factor in a finding of probable cause—the chairman of the Ohio Elections Commission panel said:

> I am deeply troubled by the problems that we face. This appears to be an election year in which we conclude if something occurred 24 years ago it should be discarded; but of course, legal precedence 24 years old [*Buckley*] can't simply be discarded.
>
> With that passage of time, perhaps a good-faith belief can be held that if the [Supreme] Court were to have the matter before it again, that it might rule otherwise.

Common Cause/Ohio v. U.S. Chamber of Commerce, No. 2000E-058 (Ohio Elections Comm'n Nov. 6, 2000) (Transcript at 39-40). For discussion of this proceeding, see T.C. Brown, *State Goes In Search of Political Ads*, The Plain Dealer, Nov. 7, 2000, at 1B, *available at* 2000 WL 5174312.

Election authorities in other states also have indicated their belief that explicit language is not needed to establish express advocacy. For example, the Florida Division of Elections has opined that express advocacy includes speech that leaves an "unmistakable impression" of support for a candidate, Florida Div. Of Elections 94-15, quoted in *Fla. Right to Life, Inc. v.*

Mortham, 1998 WL 1735137, *3 (M.D. Fl. 1998) (granting preliminary injunction in part), *aff'd sub nom. on other grounds, Fla. Right to Life, Inc. v. Lamar*, 2001 WL 40216 (11th Cir. 2001).[12]

In short, while the strong majority position is that express advocacy requires explicit words advocating electoral action, a growing minority has emerged that now causes genuine uncertainty. This exposes independent speakers to unjustified government regulation of speech and potential liability for monetary fines and even criminal violations. *See* Miss. Code Ann. §§ 23-15-811, 23-15-813, 97-13-17. Only this Court can restore the clarity *Buckley* intended.[13] Until this Court

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[12] Numerous legal periodicals reflect the confusion that has been created by opponents of the "express advocacy" standard. *See, e.g.*, Richard E. Levy, *Defining Express Advocacy for Purposes of Campaign Finance Reporting and Disclosure Laws*, 8 Kan. J.L. & Pub. Pol'y 90 (1999) (asserting that there is chaos over the meaning of express advocacy and advocating a loose standard); Glenn J. Moramarco, *Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering*, 49 Cath. U. L. Rev. 107 (1999) (acknowledging current dispute and attacking explicit language requirement); Michael D. Leffel, Note, *A More Sensible Approach to Regulating Independent Expenditures: Defending the Constitutionality of the FEC's New Express Advocacy Standard*, 95 Mich. L. Rev. 686 (1996) (acknowledging current uncertainty and advocating a context-sensitive approach); Scott E. Thomas & Jeffrey H. Bowman, *Is Soft Money Here to Stay Under the "Magic Words" Doctrine*, 10 Stan. L. & Pol'y Rev. 33 (1998) (FEC Commissioner Thomas and colleague arguing in support of FEC's context and implication regulation); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 Tex. L. Rev. 1751 (1999) (proposing an alternative definition of election-related activity); Allison Rittenhouse Hayward, *Stalking the Elusive Express Advocacy Standard*, 10 J.L. & Pol. 51 (1993) (describing existing uncertainty and inconsistency and resulting chill). The first four articles were relied upon in Defendants' Memorandum of Law in Opposition to Plaintiff's Complaint for Expedited Declaratory Relief in *Moore*.

[13] Now that final judgment has been entered, the Chamber is pursuing an appeal of *Moore* to the Fifth Circuit. However, a ruling by that court

does so, the purpose of the express advocacy standard is being defeated because political speech is being chilled, including through the growing use of unconstitutional prior restraints.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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February 1, 2001

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will not bind the Mississippi's courts or private litigants there. Nor will it bind other courts and litigants across the country.

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IN THE SUPREME COURT OF MISSISSIPPI

No. 2000-M-01839

IN RE: CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

ORDER

This matter has come before a panel of the Court composed of Presiding Justice Banks and Justices McRae and Waller, on Motion for Stay of Proceedings Pending Disposition of Petition for Interocutory Appeal filed by the Chamber of Commerce of the United States of America. Having considered the motion, the panel concludes that it is without merit and should be denied.

IT IS THEREFORE ORDERED that the Motion for Stay of Proceedings Pending Disposition of Petition for Interocutory Appeal filed by the Chamber of Commerce of the United States of America in this cause be and the same is hereby denied.

SO ORDERED, this the 3rd day of November, 2000.

/s/ _____
FRED L. BANKS, JR.,
Presiding Justice,
For The Court

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

Cause No. G-2000-2128 S/2

FRANK G. VOLLOR,

Plaintiff,

vs.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WABG-TV, GREENVILLE, MS; WXVT-TV, GREENVILLE, MS; WAPT-TV, JACKSON, MS; WJTV-TV, JACKSON, MS; WLBT-TV, JACKSON, MS; WDBD-TV, JACKSON, MS; WTOK-TV, MERIDIAN, MS; AND WCBI-TV, COLUMBUS, MS,

Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

THIS CAUSE is before the Court on Plaintiff's Motion for Temporary Restraining Order. Having reviewed the motion and Defendant's opposition to such, the Court is of the opinion that the motion is well taken and is, therefore, granted.

The court has reviewed all relevant filings, all relevant case law, and has in fact held hearing on Plaintiffs' Motion. Based upon this information, this Court is satisfied that a Temporary Restraining Order is within the interest of equity. This Court finds that Plaintiff will be irreparably and immediately harmed in the absence of immediate equitable relief by this Court. The illegal television advertisements of the Chamber of Commerce of The United States of America (hereinafter "Chamber") clearly support the opposing candidate in the Central District election for the Supreme Court of

Mississippi. These advertisements clearly affect public opinion and voting decisions, resulting in an immediate and irreparable harm to Plaintiff. This harm to Plaintiff will not be remedied by the imposition of criminal fines and charges in accordance with the election status. Therefore, Defendants are incorrect in their assertion that this Court may not restrain an action which may be criminally punished at a later date. Criminal punishment is not the purpose of this Court; instead, this Court's purpose is to halt the harm done to the Plaintiff, immediately before further harm occurs.

Defendant Chamber further asserts that it is not subject to this Court's jurisdiction as it is a corporation headquartered in Washington. However, the United States Supreme Court has clearly held that a corporation is subject to personal jurisdiction in a state in which it is "doing business." Although the Chamber is a non-profit organization, it is clearly "doing business" in Mississippi as established by law. In fact, the Chamber has involved itself intricately in the most important of Mississippi business, the election of its public officials. Therefore, it is clear that the Chamber has impliedly consented to Mississippi jurisdiction. Finally, Defendants argue that this Court should follow the decision of the District Court of Appeal of Florida in Republican Party of Florida, et. al v. The Florida Elections Commission, et. al, 658 So. 2d 653 (1995). This Court has considered this case and finds it to be distinguishable from the case at hand. In this case the Florida Court found that the issuance of an injunction was an unconstitutional prior restraint of speech as the court was required to "analyze the substance and content of the proposed communication, not just make a factual determination as to the amount of funds expended." 658 So. 2d 653, 656 (1995). In the case at hand, however, this Court is simply being asked to "make a factual determination as to the amount of funds expended." Therefore, the issuance of an injunction in this case is not an unconstitutional prior restraint of speech.

The television advertisements on behalf of Jim Smith by the Chamber are indirect expenditures which are subject to the contribution limits and reporting requirements of Mississippi Code Annotated, Section 23-15-801. Chamber of Commerce of the United States of America v. Michael Moore, Attorney General, State of Mississippi, Eric Clark Secretary of State, State of Mississippi, Civil Action No. 3:00-cv-778WS (S.D. Miss. 2000). The Chamber has violated the spending limit provision of the Mississippi Election Laws which cap individual expenditures at $5,000.00 per person or $1,000.00 per corporation. The relief sought by Plaintiff is narrowly crafted in order to achieve the proper legal result and is the least restrictive means of enforcement of the applicable laws.

Therefore, it is ordered that each of the Defendants, their agents, servants, employees, attorneys, or those in active concert with them, are hereby enjoined from contracting to transmit or transmitting any television advertisement, which is paid for or produced by the Chamber of Commerce of The United States of America, its agents, servants, or employees, concerning the Central District election for the Supreme Court of Mississippi between Jim Smith and Frank G. Vollor.

This Order shall take effect and be binding upon the filing of a bond in the amount of $1,000.00 and shall expire ten (10) days after entry or after further order of this Court, whichever is sooner.

SO ORDERED, ADJUGED, AND DECREED THIS the 3rd day of November, 2000.

/s/ _____

CHANCELLOR WILLIAM HALE SINGLETARY

SUPREME COURT OF THE UNITED STATES

No. 00A406

CHAMBER OF COMMERCE OF THE UNITED STATES,
Applicant,

v.

FRANK G. VOLLOR

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the temporary restraining order granted by the Chancery Court of the First Judicial District of Hinds County, Mississippi, case No. G-2000-2128, issued on November 3, 2000, is stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

/s/ Antonin Scalia
Associate Justice of the Supreme
Court of the United States

Dated this 6th
day of November, 2000

SUPREME COURT OF THE UNITED STATES

No. 00A406

CHAMBER OF COMMERCE OF THE UNITED STATES,
Applicant,

v.

FRANK G. VOLLOR, OLIVER DIAZ, JR.,
AND BILLY JOE LANDRUM,

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the temporary restraining orders granted by the Chancery Court of Harrison County, Mississippi issued on November 4, 2000 and by the Chancery Court of the First Judicial District of Jones County Mississippi, issued on November 5, 2000, are stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

/s/ Antonin Scalia
Associate Justice of the Supreme
Court of the United States

Dated this 6th
day of November, 2000

SUPREME COURT OF THE UNITED STATES

No.00A411

CHAMBER OF COMMERCE OF THE UNITED STATES,
Applicant,

v.

WILLIAM A. PYLE,

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the temporary restraining order granted by the Chancery Court of the First Judicial District of Hinds County, Mississippi, case No. G2000-2137, issued on November 6, 2000, is stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

/s/ Antonin Scalia
Associate Justice of the Supreme
Court of the United States

Dated this 7th
day of November, 2000

IN THE UNITED STATED DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

Civil Action No. 3:00-cv-778WS

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Plaintiff

vs.

MICHAEL MOORE, ATTORNEY GENERAL, STATE OF MISSISSIPPI, ERIC CLARK, SECRETARY OF STATE, STATE OF MISSISSIPPI

Defendants

MEMORANDUM OPINION AND ORDER

Before the court is plaintiff's Motion for Expedited Declaratory Relief under Title 28 U.S.C. §§ 2201[1] and 22022.[2] By its motion, plaintiff Chamber of Commerce of

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[1] Title 28 U.S.C. § 2201 provides:

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[2] Title 28 U.S.C. § 2202 provides:

the United States of America (hereinafter "Chamber") asks this court to declare that it may televise certain political advertisements favoring specific candidates for the popularly elected Mississippi Supreme Court without being subjected to Mississippi's law pertaining to election contributions and reporting. To be answerable under Mississippi's laws, says the Chamber, the independent expenditure by a third party must expressly advocate the election or defeat of a clearly identified candidate without cooperation or consultation with any candidate or any authorized committee or agent of such candidate, and which is not made in concert with or at the request or suggestion of any candidate or any authorized committee or agent of such candidate. According to the Chamber, their advertisements discuss issues of public interest; have not been coordinated with any particular candidates; and do not advocate for the election of any candidate. Thus, says the Chamber, if subjected to Mississippi's contribution limits and reporting requirements, it will suffer a severe impairment of its free speech rights under the First Amendment of the United States Constitution.[3]

The Attorney General and the Secretary of State of the State of Mississippi (hereinafter "the State of Mississippi"), defendants in this cause, are opposed to plaintiff's requested declaratory relief. Admitting that they have no proof whatsoever of any collaboration between the Chamber and the candidates involved in the advertisements, the defendants

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Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

[3] The First Amendment of the United States Constitution provides that, "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech*, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

contend that plaintiff's advertisements cross the boundary of issue advocacy into the arena of election advocacy and, thus, expressly advocate the election of the favored candidates for the four Mississippi Supreme Court seats.

This court's jurisdiction over this matter is asserted under Title 28 U.S.C. §§1331[4], 1334[5] and Title 42 U.S.C. § 1983.[6]

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[4] Title 28 U.S.C. § 1331 states: The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

[5] Title 28 U.S.C. § 1334 states in part: (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

[6] Title 42 U.S.C.A. § 1983 provides that, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

I. BACKGROUND

The State of Mississippi is currently in election season. In addition to the national election for President of the United States and members of Congress, Mississippi is also occupied with electing four members of its Supreme Court. Comprised of nine Justices who hail from three separate districts, the Mississippi Supreme Court, a popularly elected body, is the highest court in the State, standing in review of decisions rendered in the lower County, Circuit, Chancery, and Appeals Courts, themselves staffed by judges who are popularly elected. Except in event of a vacancy when the Governor of the State is empowered to appoint the office-holder, the members of the Mississippi Supreme Court are popularly elected by the citizenry of the respective districts and serve a term of eight years before having again to test the public's confidence at the polls. Although the contenders for the Mississippi Supreme Court are not allowed to run for the office on political party labels,[7] the contenders, as any other office-seekers, strive to raise campaign funds, acquire television and radio appearances and post election signs. Predictably, the candidates, whether incumbent or challenger, run on their qualifications, accomplishments and experience. And, since elections for Mississippi Supreme Court Justices, in character and procedure, are alike any other State election, these elections, too, are covered by Mississippi's election

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[7] Mississippi Code Annotated § 23-15-973 provides in pertinent part that, "[I] shall be the duty of the judges of the circuit court to give a reasonable time and opportunity to the candidates for the office of judge of the Supreme Court, judges of the Court of Appeals, circuit judge and chancellor to address the people during court terms. In order to give further and every possible emphasis to the fact that the said judicial offices are not political but are held without favor and with absolute impartiality as to all persons, the judges thereof should be as far removed as possible from any political affiliations or obligations. It shall be unlawful for any candidate . . To align himself . . . with any political faction or any political party. . . ."

disclosure and reporting laws found at Mississippi Code Annotated §§ 23-15-801, et seq.

On October 17, 2000 the United States Chamber of Commerce, a nonprofit corporation residing in the District of Columbia, began televising four advertisements in Mississippi which comment on the backgrounds and qualifications of four candidates for the Mississippi Supreme Court—incumbent Chief Justice Lenore Prather, Justices Jim Smith and Kay Cobb, and candidate Judge Keith Starrett. According to the Chamber, these advertisements do not fall within the embrace of Mississippi's election disclaimer and reporting laws because these advertisements do not advocate for the election or defeat, of these, or any candidates.

State Attorney General Mike Moore and Secretary of State Eric Clark disagree, contending further that these advertisements constitute "independent expenditures' subject to the reporting requirements of Mississippi Code Annotated §§ 23-15-801(j)[8] and 809[9]. Faced with the perceived risk of

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[8] Miss. Code Ann. §23-15-801(j) provides: The term "independent expenditure" shall mean an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate or any authorized committee or agent of such candidate, and which is not made in concert with or at the request or suggestion of any candidate or any authorized committee or agent of such candidate.

[9] Miss Code Ann. §23-15-809 provides:

> (a) Every person who makes independent expenditures in an aggregate amount or value in excess of Two Hundred Dollars ($200.00) during a calendar year shall file a statement containing the information required under Section 23-15-807. Such statement shall be filed with the appropriate offices as provided for in Section 23-15-805, and such person shall be considered a political committee for the purpose of determining place of filing.
>
> (b) Statements required to be filed by this section shall include:

civil and criminal penalties[10] for continuing this court declare its rights in this matter.

(i) Information indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(ii) Under penalty of perjury, a certification of whether or not such independent expenditure is made in cooperation, consultation or concert with, or at request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(iii) The identification of each person who made a contribution in excess of Two Hundred Dollars ($200.00) to the person filing such statement which was made for the purpose of furthering an independent expenditure.

[10] Mississippi Code Annotated § 23-15-811 provides that, "(a) Any candidate or any other person who shall willfully and deliberately and substantially violate the provisions and prohibitions of this article shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine in a sum not to exceed Three Thousand Dollars ($3,000.00) or imprisoned for not longer than six (6) months or by both fine and imprisonment.

(b) In addition to the penalties provided in paragraph (a) of this section, any candidate or political committee which is required to file a statement or report which fails to file such statement or report on the date in which it is due may be compelled to file such statement or report by an action in the nature of a mandamus.

(c) No candidate shall be certified as nominated for election or as elected to office unless and until he files all reports required by this article due as of the date of certification.

(d) No candidate who is elected to office shall receive any salary or other remuneration for the office unless and until he files all reports required by this article due as of the date such salary or remuneration is payable.

(e) In the event that a candidate fails to timely file any report required pursuant to this article but subsequently files a report or reports containing all of the information required to be reported by him as of the date on which the sanctions of paragraphs (c) and (d) of this section would be applied to him, such candidate shall not be subject to the sanctions of said paragraphs (c) and (d).

II. THE ADVERTISEMENTS

The four advertisements precipitating this lawsuit are marked as Exhibits B, C, D and E to the plaintiff's complaint. Each advertisement is described below.

Exhibit B-The Chief Justice Lenore Prather Advertisement

Exhibit B begins with the photograph of a gavel and a picture of Chief Justice Lenore Prather slowly materializes in the background. The narration states, "Lenore Prather—Chief Justice of Mississippi's Supreme Court; Lenore Prather—using common sense principles to uphold the law; Lenore Prather—putting victims rights ahead of criminals and protecting our Supreme Court from the influence of special interests." As the narration proceeds, the words "Chief Justice," "Common Sense," and "Victims Rights" appear on the screen. The narrator then states that Lenore Prather was the first woman appointed to the Mississippi Supreme Court, and that she has thirty-five years of experience.

Exhibit C-The Judge Keith Starrett Advertisement

Exhibit C begins with the narration, "Keith Starrett—a common sense Justice." As pictures of Judge Starrett appear on the screen, followed by scenes of school children and scenes of citizens going about their daily routines, the narrator says that Keith Starrett formed the first drug court in Mississippi, and that Starrett's drug court saved taxpayers over one half million dollars in the first year. Then, as the words "Baptist Deacon" and "Victim's Rights Count" appear on the screen, the narration states, "a Baptist Deacon who once headed South Mississippi Child Protection, Starrett knows victims have as much a right to justice as defendants do." The narration closes with, "Judge Keith Starrett—he knows victims rights count!"

Exhibit D-The Justice Kay Cobb Advertisement

Exhibit D is an advertisement touting incumbent Justice Kay Cobb. The narration provides the following, "A teacher, a prosecutor, a Supreme Court Judge. Justice Kay Cobb. At the Bureau of Narcotics she took drug pushers off the streets and put them behind bars. On the Supreme Court she uses common sense to protect the rights of victims." These words appear on the screen simultaneously as they are narrated. The narration then continues with, "Justice Kay Cobb has worked to end the judicial backlog, eliminate endless appeals and insure that death penalty cases are tried promptly." The narration concludes, "Justice Kay Cobb—victims rights count!"

Exhibit E-The Justice Jim Smith Advertisement

Finally, Exhibit E is an advertisement for Justice Jim Smith. An American flag is in the background. The name Jim Smith remains visible throughout the narration, and a scales-of-justice appears in the left part of the screen. While the narration explains that Jim Smith uses common sense and puts victim's rights first, the words, "96% conviction rate" appear on the screen. The narrator states that, "[a]s a district attorney and prosecutor he had a 96% conviction rate. As a judge, he understands that victims rights come ahead of criminal's rights. Judge Jim Smith. For ten years on the Rankin County bench he upheld existing laws—instead of trying to make new ones. He carried that same common sense approach to the Supreme Court in 1993." The narration ends with, "Judge Jim Smith—common sense on the bench!"

All of the advertisements are about thirty seconds in length, and direct the viewer to a web site, www.Litigation Fairness.org, which contains a link to web pages which urge the support of the election of two of these particular candidates, Justice Cobb and Judge Starrett, while presenting the biographies of Chief Justice Prather and Justice Smith. A

sample of these web pages are attached to this opinion as an appendix.

The advertisements *sub judice* do not dwell on any particular issue, but instead ascribe attributes which a voter might find to be desirable in a candidate for judicial office to each of the named candidates. Nor do the advertisements discuss, mention, implicate or concern any person other than the particular candidate being touted in the advertisement. The prominent references to judicial philosophy (common sense) and victim's rights are not accompanied by any elaboration. While the plaintiff contends that technically there is no mention of an election in these advertisements, the State of Mississippi notes that they are being aired at the same time statewide judicial elections are being conducted.

III. STANDING AND RIPENESS

A federal court must find that Article III standing requirements are met before proceeding. These requirements include (1) "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) causation, meaning that the injury is "fairly traceable to the challenged action of the defendant"; and (3) redressability, meaning that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Valley v. Rapides Parish School Board, 145 F.3d 329, 332 (5th Cir. 1998), citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). The standing component that deals directly with ripeness is the requirement of "imminence." In a declaratory action, the threatened injury must be "sufficiently 'imminent' to establish standing." Id. A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" See Texas v. United States, 523 U.S. 296, 118 S.Ct. 1257, 1259-60, 140 L.Ed.2d 406 (1998).

In the instant case the parties agree that the Chamber has standing, and the likelihood of litigation is conceded by the parties to be imminent. Therefore, the ripeness balance weighs in favor of addressing this controversy.

IV. THE APPLICABLE MISSISSIPPI STATUTES

The Mississippi statutes providing the focal point of this lawsuit are Mississippi Code Annotated §§ 23-15-801(j) and 23-15-809, statutes dealing with independent expenditures for the purpose of advocating a particular electoral result, but without consulting with or obtaining the cooperation of any candidate. The Attorney General acknowledges that the advertising expenditures in question are individual expenditures, and that he has no proof that the Chamber has consulted any candidate or acted in collusion with any candidate in presenting these advertisements.

Mississippi Code Annotated § 23-15-801 (j) provides that the term "independent expenditure" shall mean an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate, without that candidate's cooperation or consultation. Mississippi Code Annotated § 23-15-809 provides that a person who makes independent expenditures in the amount or value of Two Hundred Dollars ($200.00) or more during a calendar year shall file a statement containing the information required under § 23-15-807.

The Chamber contends that if these statutes are applied to the advertisements in question, then their application will offend the First and Fourteenth Amendments of the United States Constitution. The guaranties afforded by the First Amendment are protected by the due process clause of the Fourteenth Amendment. Williams v. Rhodes, 393 U.S. 23, 30-31, 89 S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968); New York Times v. Sullivan, 376 U.S. 254, 276-77, 84 S.Ct. 710, 724, 11 L.Ed.2d 686, 709 (1964); Cantwell v. Connecticut, 310

U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1217 (1940); and De Jonge v. Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 LEd. 278, 283 (1937). There is no question that political expression is protected speech under the First Amendment. Colson v. Grohman, 174 F.3d 498, 506 (5th Cir. 1999), citing Connick v. Myers, 461 U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The United States Supreme Court often has reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection. First National Bank v. Bellotti, 435 U.S. 765, 776, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (stating that speech on matters of public concern is "at the heart of the First Amendment's protection"); and Rash-Aldridge v. Ramirez, 96 F.3d 117, 119 (5th Cir. 1996) (same).

V. THE UNITED STATES SUPREME COURT PRECEDENTS

The fountainhead case governing the issues of concern in the instant case is Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). The Buckley decision limited the range of political speech that may be regulated by the Federal Election Campaign Act only to "express advocacy," that is, a communication which explicitly advocates the election or defeat of clearly identifiable candidates. The Supreme Court's decision distinguished "issue advocacy," which is the discussion of issues and/or candidates' positions on them. Under Buckley, this form of communication is not subject to regulation. The Buckley decision, particularly its statement at footnote 52, has given rise to what is now referred to as the "express advocacy' standard. Footnote 52 of the Buckley opinion refers to § 608(e)(1) of the Federal Election Campaign Act and to the construction of statute's scope as being limited to communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote

against," "defeat," and "reject." Other courts have given the "express advocacy" standard the rubric "magic words" test, or "bright line" rule. See Federal Election Commission v. Christian Action Network, Inc., 110 F.3d 1049, 1051 (4th Cir. 1997), referring to the "magic words" of Buckley's footnote 52; and see Faucher v. Federal Election Commission, 928 F.2d 468 (1st Cir.), cert. denied, 502 U.S. 820, 112 S.Ct. 79, 116 L.Ed.2d 52 (1991) (for the reference to a "bright line" rule being established by Buckley). Whether the standard is referred to as "express advocacy" or "magic words," or the "bright line" rule, many courts interpret this standard to require words of advocacy such as those recited in footnote 52 of the Buckley opinion before regulatory jurisdiction over an independent or corporate expenditure can exist.

The United States Supreme Court revisited the Buckley decision in Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 248-49, 107 S.Ct. 616, 623, 93 L.Ed.2d 539 (1986) (a case often referred to in short as "MCFL"). Here the Supreme Court was faced for the first time since its decision in Buckley with a form of advertisement, specifically, a newsletter.

The MCFL, an nonprofit group concerned with right-to-life issues, prepared and distributed a newsletter in the ordinary course of its operations. Prior to the September 1978 primary elections, the MCFL printed and distributed a "Special Edition" of its newsletter. While the May 1978 edition of the newsletter had been mailed to 2,109 people, and the October 1978 edition to 3,119 people, more than 100,000 copies of the "Special Edition" were printed for distribution. The front page of the publication was headlined "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," and readers were admonished that "[n]o pro-life candidate can win in November without your vote in September." "VOTE PRO-LIFE" was printed in large bold-faced letters on the back page, and a coupon was provided to be clipped and taken to

the polls to remind voters of the name of the "pro-life" candidates. Next to the exhortation to vote "pro-life" was a disclaimer: "This special election edition does not represent an endorsement of any particular candidate."

The MCFL Court also held that an expenditure must constitute "express advocacy" in order to be subject to the statutory prohibition in question, and that the Special Edition constituted express advocacy, citing Buckley. The MCFL Court stated that, "Buckley adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons. We therefore concluded in that case that a finding of 'express advocacy' depended upon the use of language such as 'vote for,' 'elect,' 'support,' etc." MCFL, 479 U.S., at 248, citing Buckley, supra, at 44, n. 52, 96 S.Ct., at 646, n. 52. The MCFL Court then noted that the Special Edition not only urged voters to vote for "pro-life" candidates, but also identified and provided photographs of specific candidates fitting that description. Said the Court, "[t]he Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, *it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature. . . .*" MCFL, 479 U.S., at 240 (Emphasis added).

Thus, the MCFL Court, faced with an actual communication, determined that "express advocacy" was present in the "Special Edition" of MCFL's newsletter based on the timing of the edition, the unusually large quantity of copies being disseminated, and the exhortations to vote for pro-life candidates, notwithstanding the absence of the "magic words" found at footnote 52 of the Buckley decision.

VI. THE CIRCUIT DIVIDE

A. The Narrow Interpretation

Several Circuit Courts which have had the opportunity to apply the "express advocacy" test based on Buckley and MCFL have adopted a very narrow construction of what these cases require. For instance, in Maine Right to Life Committee, Inc. v. Federal Election Commission, 914 F. Supp. 8 (D. Me. 1996), aff'd per curiam, 98 F.3d 1 (1st Cir. 1996) (referring to Buckley as having established a "bright line" rule), a nonprofit membership corporation and a reader of its publications brought suit seeking a declaratory judgment that the Federal Election Commission's definition of "express advocacy" as to which corporate financial support was prohibited under the Federal Election Campaign Act was too broad, beyond authority, and unconstitutionally vague. The district court agreed, applying the bright line rule that a finding of "express advocacy" requires the presence in a communication of some or all of the explicit words found at footnote 52 of the Buckley opinion. Like Buckley, Maine Right to Life Committee dealt with the interpretation of legislation rather than a specific communication. See also, Faucher v. Federal Election Commission, 743 F.Supp. 64, 68 (D.Me.1990), *aff'd*, 928 F.2d 468 (1st Cir.), cert. denied, 502 U.S. 820, 112 S.Ct. 79, 116 L.Ed.2d 52 (1991), following Buckley by narrowly construing the same federal election laws considered in Buckley.

In Federal Election Commission v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997), the Fourth Circuit affirmed the district court's dismissal of a Federal Election Commission lawsuit which complained that an advocacy organization's expenditures for a television commercial violated federal election laws governing disclosure of campaign funds. The advertisement in question included the following text which was read by a narrator: "Bill Clinton's vision for America includes job quotas for homosexuals,

giving homosexuals special civil rights, allowing homosexuals in the armed forces. Al Gore supports homosexual couples' adopting children and becoming foster parents. Is this your vision for a better America? For more information on traditional family values, contact the Christian Action Network."

The Fourth Circuit opted for the clear, categorical limitation of Buckley, holding that only expenditures for communications using explicit words of candidate advocacy are prohibited. . . ." Id. at 1051. The Fourth Circuit therefore rejected the Federal Election Commission's position that "express advocacy" could be established by looking at a group's use of imagery, rhetoric, and symbols in criticizing a candidate's position. Id., at 1064.

In Iowa Right to Life Comm., Inc. v. Williams, 187 F.3d 963 (8th Cir. 1999), various organizations which had as one of their purposes political speech sought a preliminary injunction against the enforcement of a provision of an Iowa Campaign Disclosure-Income Tax Check-off Act containing reporting requirements for independent political expenditures. The district court granted the injunction and the Eighth Circuit affirmed, holding that the Buckley decision made clear that a "finding of 'express advocacy' depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc." Significantly, the Eighth Circuit noted that Buckley did not provide an exclusive list of words, and that any such communication must contain express language of advocacy with an exhortation to elect or defeat a candidate. The Eighth Circuit also cited Federal Election Commission v. Furgatch, 807 F.2d 857, 864 (9th Cir. 1987) and its teaching that speech may be termed "advocacy" if it presents a clear plea for

action. Speech that is merely informative, said the Eighth Circuit, is not covered by the Act.[11]

Vermont Right to Life Committee v. Sorrell, 221 F.3d 376 (2nd Cir. 2000), involved a nonprofit corporation (the VRLC) whose goal was to promote right-to-life issues. The VRLC brought a § 1983 action against various state officials, seeking a declaratory judgment that certain sections of a Vermont campaign finance law establishing disclosure requirements for political advertising and reporting requirements for mass media expenditures were facially unconstitutional under the First Amendment. The Second Circuit reversed the district court's dismissal of the case, holding that the plaintiffs had standing. The Court noted that a significant issue would be whether the state statutes in question applied only to advertising and "mass media activities" "that expressly advocated the election or defeat of a clearly identified candidate," citing Buckley. See also, Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, 612 F.2d 45 (2nd Cir. 1980), following the narrower standard based on Buckley's footnote 52.

B. The Broader Interpretation

Set against the narrow interpretation applied by the First, Second, Fourth and Eighth Circuits is the Ninth Circuit's decision in Federal Election Commission v. Furgatch, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S. 850, 108 S.Ct. 151

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[11] While the Eighth Circuit's decision is touted by the plaintiffs and strictly following Buckley, it is apparent that the Eight Circuit did not consider a finding of express advocacy to be strictly limited to the words contained in Buckley's footnote 52, noting that in Federal Election Commission v. Furgatch, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S. 850, 108 S.Ct. 151, 98 L.Ed.2d 106 (1987), the Ninth Circuit had allowed the prohibition of the "Don't Let Him Do It" speech as expressed advocacy, and recognizing that the ruling was "a very close call," id., at 861.

98 L.Ed.2d 106 (1987). According to Furgatch, express advocacy may exist if the purpose of the message in question is suggestive of only one meaning, makes a clear plea for action, and is clear as to what action is advocated. Id., at 864.

Furgatch involved an enforcement action against an individual for publishing a newspaper advertisement critical of President Jimmy Carter and urging the readers "Don't let him do it." The Federal Election Commission (hereinafter the "FEC") sued, claiming a violation of Federal Election Campaign Act for the failure to report this expenditure to the FEC and to place a disclaimer on it. The Ninth Circuit agreed with the FEC that these violations had occurred, stating that, "reasonable minds could not dispute that Furgatch's advertisement urged readers to vote against Jimmy Carter. This was the only action open to those who would not 'let him do it.'" Id., at 864. The court summarized its holding as follows:

> We conclude that speech need not include any of the words listed in Buckley to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take

> some other kind of action. We emphasize that if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements. This is necessary and sufficient to prevent a chill on forms of speech other than the campaign advertising regulated by the Act. At the same time, however, the court is not forced under this standard to ignore the plain meaning of campaign-related speech in a search for certain fixed indicators of "express advocacy."

Id., at 864.

The Furgatch decision takes its lead from the United States Supreme Court's decisions in both Buckley and MCFL.[12] Cases which have adopted the approach taken in the Furgatch decision are FEC v. National Organization for Women, 713 F. Supp. 428, 434 (D.D.C. 1989); Osterberg v. Peca, 12 S.W.3d 31, 52 (Tex. 2000); Elections Bd. v. Wisconsin Manufacturers & Commerce, 597 N.W.2d 721, 723-24, 731 (Wisc. 1999); and State ex rel. Crumpton v. Keisling, 982 P.2d 3, 10 (Or. Ct. App. 1999).

In Federal Election Commission v. National Organization for Women, NOW used corporate money to pay for three letters sent to the general public which contained so called "electioneering messages." According to NOW, these letters

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[12] The Furgatch Court cited the First Circuit's opinion in Federal Election Commission v. Massachusetts Citizens for Life, Inc., 769 F.2d 13 (1st Cir.1985)(MCFL), which was on appeal to the United States Supreme Court at the time the Furgatch case was argued to the Ninth Circuit in June of 1986. On December 15, 1986, the United States Supreme Court affirmed the First Circuit's decision in MCFL. The Ninth Circuit handed down Furgatch on January 9, 1987. Even though the Furgatch Court may have missed the opportunity to include the United States Supreme Court citation in its final opinion draft, the relevant points of law remained the same. The First Circuit's MCFL decision being affirmed by the United States Supreme Court did not disturb the Furgatch decision.

were aimed solely at soliciting new members by setting forth the group's political goals. One of the letters in question urged the recipient to join NOW and to wear a 59 cents button as a symbol of the fact that women earn 59 cents for every dollar earned by men. While the letter focused on issues (wage discrimination, Social Security, divorce law, education), it also criticized political leaders for their adverse positions or lack of attention to these issues. Three sentences in the four-page "59 cents letter" are critical of public officials: "And now the Reagan Administration is threatening to make a dangerous situation even worse. . . ." "A bad economy, coupled with an antagonistic Administration in Washington, poses an immediate and real threat to the economic rights of women everywhere. . . ."; and "The New Right, the Reagan Administration, and the Republican Party all thought that "the ladies" would go away after the ERA deadline expired. Were they ever wrong!"

The district court held that this and two other similar letters contained no express advocacy as required by Buckley and MCFL to place the letters within the ambit of the federal statute. "The words listed in Buckley," said the district court, "are not the only ones which will be deemed express advocacy. In Furgatch, the Ninth Circuit held that express advocacy is not strictly limited to communications using certain key phrases. 'The short list of words included in the Supreme Court's opinion in Buckley does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate." Furgatch, 807 F.2d at 863. The court of appeals proposed a standard for express advocacy: that speech, when read as a whole and with limited reference to external events, may only be interpreted as an exhortation to vote for or against a specific candidate."

Following the broader standard, the district court concluded that, "[b]ecause the letters are suggestive of several plausible meanings, because there are numerous pleas

for action, and because the types of action are varied and not entirely clear, NOW's letters fail the express advocacy test." 713 F.Supp., at 435. The district court also noted that NOW's three mailings included no explicit words directing the reader how to vote.

In State ex rel. Crumpton v. Keisling, the Oregon Court was confronted with mailings and newspaper advertisements that contained a "WARNING" that public employee unions were buying the "DEMOCRAT[IC] ELECTIONS." These advertisements contained the pictures of particular candidates and the amount of support each had received from public employee unions. The Oregon court expressed the same concerns as the Ninth Circuit in Furgatch that election laws must not be "cleverly circumvented, or thwarted by a rigid construction." Thus, the Court adopted the Furgatch "reasonable minds could differ" test. 982 P.2d 3, 10 (Or. Ct. App. 1999). "The purpose," said the Court, "is not to search for magic words—which careful drafters can, as in this case, usually avoid—but to find the essential message that the publication communicates to the reader. In doing this, the context of the publication—particularly whether or not it came in the midst of a contested election campaign—can play a role in determining how the reader would understand it and, thus, what its message is." Id.

In Osterberg v. Peca, 12 S.W.3d 31, 52 (Tex. 2000), the Osterbergs, aggrieved at a ruling by Judge Peca, donated $34,200.00 to the campaign of his opponent in the subsequent election, and paid for a television advertisement which consisted of the following text: "CONSIDER THIS: Judge Peca was chosen by his peers El Paso's outstanding jurist; He graduated Summa Cum Laude; He worked to reduce his docket for over seven years; IF THAT'S ENOUGH, VOTE FOR HIM. [next screen] But if you want ONE who understands: The Courthouse exists for the people . . . etc. BRING THE COURTHOUSE BACK TO THE PEOPLE!

VOTE FOR HIS OPPONENT and remove HIM if he fails the will of the people!" The Texas Court refused to accept the contention that the Buckley test required the application of a rigid standard, noting that while Buckley restricted "express advocacy" to "spending that is unambiguously related to the campaign of a particular federal candidate" and to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject,' " Id. at 44 n. 52, the United States Supreme Court in MCFL had stepped beyond the rigid test of Buckley by stating that a message can be "marginally less direct" than the examples listed in Buckley so long as its essential nature "goes beyond issue discussion to express electoral advocacy." See MCFL, 479 U.S., at 249.

The Osterberg Court also observed that the descriptions given in Buckley and MCFL, "do not give unambiguous answers to the myriad situations that arise." Id. 12 S.W.3d, at 52, citing Wisconsin Right to Life, Inc. v. Paradise, 138 F.3d 1183, 1186 (7th Cir.), cert. denied, 525 U.S. 873, 119 S.Ct. 172, 142 L.Ed.2d 140 (1998) for that same observation.

VII. THE RESPECTIVE POSITIONS OF THE PARTIES SUB JUDICE

The Chamber contends that this court must employ the "magic words" test to this dispute *sub judice*, a standard, says the Chamber, which has been applied by the majority of other jurisdictions which have had the opportunity to address this question. So long as the words used in Buckley's footnote 52 are avoided, says the Chamber, political speakers avoid regulation under any circumstances. During oral argument this court posed a number of hypotheticals to counsel for the Chamber seeking to determine the Chamber's perspective on the scope of Buckley. In response to each of the court's hypotheticals, Chamber's counsel responded that unless the

advertisements contained one of the eight magic words appearing at Buckley's footnote 52, the advertisements should not be construed as examples of express advocacy.[13]

In contrast, the State of Mississippi argues that the court should not leave common sense at the doorstep when it considers these matters, and that the definition of "express advocacy" should not require the court to be blind to what all "others can see and understand." The "magic words" approach, says the State of Mississippi, creates a large loophole which would allow all forms of organizations inside and outside of Mississippi to spend unlimited funds on commercials which unambiguously support candidates, with no transparency regarding the source of the funding. The Chamber, says the State of Mississippi, should not be permitted to take refuge in the "magic words" approach simply by cleverly omitting from the commercials in question the specific words listed at footnote 52 of the Buckley decision. In summary, the State is concerned that persons or organizations will surreptitiously advocate the election or defeat of a named candidate but avoid legitimate government regulation by simply omitting "magic words" of advocacy. See Iowa Right to Life Comm, Inc. v. Williams, 187 F.3d

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[13] During oral argument this court asked plaintiff's counsel whether either of the following instances would offend the express advocacy test:

> (1) a narration of the favored candidate's qualifications, a picture of the favored candidate along side the opponent with a line drawn through the picture of the opponent, all superimposed over people standing in what appears to be a voting line; and (2) an advertisement identical to one paid for and run by a specific candidate in which the candidate merely states a qualification while the independent ad simply omitting the words "vote for me" contained in the candidate's ad. Counsel responded that neither of these examples contained express advocacy under the bright line standard of Buckley. Thus, plaintiff's counsel sees no crack in the express advocacy test, unless the ad contains "magic words."

963, 970 (8th Cir. 1999) (commenting on the State of Iowa's position in the Williams case).

VIII. ANALYSIS

Express advocacy is a very narrow class of election-related speech that in "explicit words" or by "express terms advocates the election or defeat of a clearly identified candidate." Federal Election Commission v. Massachusetts Citizens for Life. Inc., 479 U.S. 238, 248-49, 107 S.Ct. 616, 623, 93 L.Ed.2d 539 (1986). In contrast to express advocacy, issue advocacy is the discussion of issues and candidates' positions on those issues without expressly advocating a candidate's election or defeat. The United States Supreme Court has recognized that issue advocacy sometimes may influence the election or defeat of particular candidates, but that does not convert it into express advocacy. Issue advocacy is protected by the First Amendment and can be subjected to no regulation, regardless of its effect on an election. See MCFL, 479 U.S., at 257 n.10. So, the question to be resolved by this court is whether the advertisements at hand constitute merely issue discussion, or whether they expressly advocate for the election of a particular candidate. A court analyzing whether a given statute comports with the First Amendment must hesitate before "imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems." Denver Area Education Telecommunications. Consortium, Inc. v. F.C.C., 518 U.S. 727, 116 S.Ct. 2374, 2385, 135 L.Ed.2d 888 (1996).

This court, in opposition to the Chamber's urgings, declines to strictly limit express advocacy to the "magic words" of Buckley's footnote 52. As Furgatch correctly observed, Buckley's footnote 52 does "not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate." Furgatch, at pages 862-63. Further, and even more importantly, the United States Supreme Court itself, in this court's eye, in MCFL

determined to move beyond the rigid, overly simplistic "magic words" test of Buckley. In MCFL, the Court seemingly moved away from a rigid, talismanic application of Buckley's footnote 52 to an "essential nature" inquiry, as the Court found express advocacy even though the communication at issue was, "marginally less direct than 'Vote for Smith'," one of the "magic words" contained in footnote 52 of the Buckley opinion.

Whether examining the advertisements at hand under the "essential nature" test of MCFL, or under Furgatch's "no other reasonable interpretation" test, this court finds that the advertisements at issue provide explicit directives to vote for the named candidates. These advertisements simply cannot be regarded as mere discussions of public issues. Aired[14] at the very time statewide judicial elections were being conducted in Mississippi, the advertisements contain no true discussion of issues. While the advertisements mention "victims rights" and a "common sense judicial philosophy," the advertisements present no elaboration of these points. Instead, while providing only the background and experience of each candidate, the advertisements repeatedly insert the candidates' names between qualification assertions and each advertisement concludes with an emphatic phrase obviously designed to exhort support for the candidates' election to the Mississippi Supreme Court. Although the express words "vote for the candidate" do not appear anywhere in the advertisements, no reasonable viewer would construe the advertisements otherwise. The viewer sees a sleek, well prepared advertisement, just as a candidate's campaign staff might prepare.

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[14] While timing itself is no talisman of express advocacy, it is a useful element in the court's overall consideration, just as it was in MCFL, where the Supreme Court noted that the 100,000 copies of the "Special Edition" were prepared for dissemination during the September 1978 primary elections.

Further, these advertisements are virtually the same as the advertisements being aired by the candidates themselves. The advertisements repeat the touted candidates' names in the very same manner as the candidates own advertisements which exhort the viewing public to vote for the named candidates. In this court's view, a finding of any use of "magic words" becomes unnecessary when an advertisement clearly champions the election of a particular candidate as the person who will use common sense, ensure prompt adjudication of death penalty cases and uphold victim's rights.

The advertisements display a web site, www.LitigationFairness.org. Significantly, when accessed, the web site contains a link entitled "Mississippi Candidate Information." The link ultimately leads to web pages which exhort the public's support for the election of two of the named candidates, Justice Kay Cobb and Judge Keith Starrett.

True issue advocacy invigorates debate on many issues such as the environment, civil rights, welfare and education, and other matters which, due to their nature, may name candidates who are either supportive of, or contrary to a particular issue. Also critical in the overall calculus, however, is the necessity of having legislation which is effective and capable of informing the public, while condemning abuse of the special status given to true issue advocacy. Ever seeking to be vigilant for the protection of true issue advocacy, this court concludes that legitimate issue advocacy is not before the court today, and that this ruling will not have a chilling effect upon those anxious to exercise their First Amendment political speech rights.

IX. CONCLUSION

Therefore, this court finds the advertisements in question contain express advocacy, and are offensive under Buckley and MCFL. This court is persuaded that these advertisements do not attempt to discuss issues. Rather, the advertisements offer thinly veiled exhortations to support the campaigns of the aforesaid candidates, a plain, clever attempt to avoid the reach of the Mississippi reporting and disclosure laws by eliminating those words listed at footnote 52 of Buckley.

Accordingly, this court hereby denies the request of the Chamber of Commerce of the United States of America for declaratory relief from any subjection to the Mississippi laws governing independent expenditures. Instead, the court finds that the advertisements at issue which favor four specific candidates for the popularly elected Mississippi Supreme Court expressly advocate their elections and, as such, the Chamber must answer under Mississippi's contribution limits and reporting requirements as found at Mississippi Code Annotated §§ 23-15-801 et seq.

The Court shall enter a separate judgment in accordance with Rule 58 of the Federal Rules Civil Procedure.

SO OREDED this the 2nd day or November, 2000

/s/ _____
UNITED STATES DISTRICT JUDGE

Civil Action No. 3:00-cv-778WS
Memorandum Opinion and Order

[PRINTED WEB PAGES ATTACHED TO THIS OPINION LODGED WITH SUPREME COURT]

IN THE UNITED STATED DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3:00-cv-778WS

CHAMBFR OF COMMERCE OF THE
UNITED STATES OF AMERICA,
Plaintiff,

vs.

MICHAEL MOORE, ATTORNEY GENERAL,
STATE OF MISSISSIPPI,
ERIC CLARK, SECRETARY OF STATE,
STATE OF MISSISSIPPI
Defendants.

FINAL JUDGMENT

This cause came before the court on the plaintiffs Motion for Expedited Declaratory Relief under Title 28

U.S.C. §§ 2201 [1] and 2202 [2], asking this court to declare that the plaintiff may televise certain political advertisements favoring specific candidates for the popularly elected Mississippi Supreme Court without being subjected to Mississippi's law pertaining to election contributions and reporting. This court, after considering the arguments and briefs of the parties, found in a separate Memorandum Opinion and Order that the advertisements at issue provided explicit directives to vote for the named candidates, and were subject to Mississippi's law governing election contribution disclosure. Therefore, in accordance with this court's Memorandum Opinion and Order, this court finds for the defendants and against the plaintiff, and the defendants are entitled to recover costs.

SO ORDERED AND ADJUDGED this the 23rd day of January, 2001.

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[1] Title 28 U.S.C. § 2201 provides:

> (a) In a case of actual controversy within its jurisdiction except with respect to Federal taxes other than actions brought under section 7428 of the internal Revenue Code of 1986 a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[2] Title 28 U.S.C. § 2202 provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

/s/ _____
UNITED STATES DISTRICT JUDGE

Civil Action No. 3:00-cv-778WS
Final Judgment

MISSISSIPPI ELECTION STATUTES
(Excerpts)

Mississippi Code Annotated § 23-15-801 (2000).

Definitions

* * * *

(c) "Political committee" shall mean any committee, party, club, association, political action committee, campaign committee or other groups of persons or affiliated organizations which receives contributions aggregating in excess of Two Hundred Dollars ($200.00) during a calendar year of which makes expenditures aggregating in excess of Two Hundred Dollars ($200.00) during a calendar year for the purpose of influencing or attempting to influence the action of voters for or against the nomination for election, or election, of one or more candidates, or balloted measures and shall, in addition, include each political party registered with the Secretary of State.

* * * *

(e)(i) "Contribution" shall include any gift, subscription, loan, advance or deposit of money or anything of value made by any person or political committee for the purpose of influencing any election for elective office or balloted measure;

(ii) "Contribution" shall not include the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee; or the cost of any food or beverage for use in any candidate's campaign or for use by or on behalf of any political committee of a political party;

(iii) "Contribution to a political party" includes any gift, subscription, loan, advance or deposit of money or anything of value made by any person, political committee, or other organization to a political party and to any committee,

subcommittee, campaign committee, political committee and other groups of persons and affiliated organizations of the political party.

(iv) "Contribution to a political party" shall not include the value of services provided without compensation by any individual who volunteers on behalf of a political party or a candidate of a political party.

(f)(i) "Expenditure" shall include any purchase, payment, distribution, loan, advance, deposit, gift of money or anything of value, made by any person or political committee for the purpose of influencing any balloted measure or election for elective office; and a written contract, promise, or agreement to make an expenditure;

(ii) "Expenditure" shall not include any news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate; or nonpartisan activity designed to encourage individuals to vote or to register to vote;

(iii) "Expenditure by a political party" includes 1. any purchase, payment, distribution, loan, advance, deposit, gift of money or anything of value, made by any political party and by any contractor, subcontractor, agent, and consultant to the political party; and 2. a written contract, promise, or agreement to make such an expenditure.

* * * *

(j) The term "independent expenditure" shall mean an expenditure by a person expressly advocating the election or defeat of a clearly indemnified candidate which is made in concert with or at the request or suggestion of any candidate or any authorized committee or agent of such candidate.

(k) The term "clearly identified" shall mean that:

(i) The name of the candidate involved appears; or

(ii) A photograph or drawing of the candidate appears; or

(iii) The identity of the candidate is apparent by unambiguous reference.

Mississippi Code Annotated § 23-15-803 (2000).

Political committee statements

(a) Statements of organization. Each political committee shall file a statement of organization no later than ten (10) days after receipt of contributions aggregating in excess of Two Hundred Dollars ($200.00), or no later than ten (10) days after having made expenditures aggregating in excess of Two Hundred Dollars ($200.00).

(b) Contents of statements. The statement of organization of a political committee shall include:

(i) The name and address of the committee and all officers;

(ii) Designation of a director of the committee and a custodian of books and accounts of the committee, who shall be designated treasurer; and

(iii) If the committee is authorized by a candidate, the name, address, office sought, and party affiliation of the candidate.

(c) Change of information in statements. Any change in information previously submitted in a statement of organization shall be reported and noted on the next regularly scheduled report.

Mississippi Code Annotated § 23-15-807 (2000).

Who must report; when; contents

(a) Each candidate or political committee shall file reports of contributions and disbursements in accordance with the provisions of this section. All candidates or political committees required to report may terminate its obligation to

report only upon submitting a final report that it will no longer receive any contributions or make any disbursement and that such candidate or committee has no outstanding debts or obligations. The candidate, treasurer or chief executive officer shall sign each such report.

* * * *

(d) Contents of reports. Each report under this article shall disclose:

(i) For the reporting period and the calendar year, the total amount of all contributions and the total amount of all expenditures of the candidate or reporting committee which shall include those required to be identified pursuant to item (ii) of this paragraph as the total of all other contributions and expenditures during the calendar year. Such reports shall be cumulative during the calendar year to which they relate;

(ii) The identification of:

1. Each person of political committee who makes a contribution to the reporting candidate or political committee during the reporting period, whose contribution or contributions within the calendar year have an aggregate amount or value in excess of Two Hundred Dollars ($200.00) together with the date and amount of any such contribution;

2. Each person or organization, candidate or political committee who receives an expenditure, payment or other transfer from the reporting candidate, political committee or its agent, employee, designee, contractor, consultant or other transfer to such person, organization, candidate or political committee within the calendar year have an aggregate value or amount in excess of Two Hundred Dollars($200.00) together with the date and amount of such expenditure.

(iii) The total amount of cash on hand of each reporting candidate and reporting political committee;

* * * *

(e) The appropriate office specified in Section 23-15-805 must be in actual receipt of the reports specified in this article by 5:00 p.m. on the dates specified in paragraph (b) of this section. If the date specified in paragraph (b) of this section shall fall on a weekend or legal holiday then the report shall be due in the appropriate office at 5:00 p.m. on the first working day before the date specified in paragraph (b) of this section. The reporting candidate or reporting political committee shall ensure that the reports are delivered to the appropriate office by the filing deadline. The Secretary of State may approve specific means of electronic transmission of completed campaign finance disclosure reports, which may include, but not be limited to, transmission by electronic facsimiles (FAX) devices.

* * * *

Mississippi Code Annotated § 23-15-811 (2000).

Sanctions

(a) Any candidate or any other person who shall willfully and deliberately and substantially violate the provisions and prohibitions of this article shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine in a sum not to exceed Three Thousand Dollars ($3,000.00) or imprisoned for not longer than six (6) months or by both fine and imprisonment.

(b) In addition to the penalties provided in paragraph (a) of this section, any candidate or political committee which is required to file a statement or report which fails to file such statement or report on the date in which it is due may be compelled to file such statement or report by an action in the nature of a mandamus.

(c) No candidate shall be certified as nominated for election or as elected to office unless and until he files all

reports required by this article due as of the date of certification.

(d) No candidate who is elected to office shall receive any salary or other remuneration for the office unless and until he files all reports required by this article due as of the date such salary or remuneration is payable.

(e) In the event that a candidate fails to timely file any report required pursuant to this article but subsequently files a report or reports containing all of the information required to be reported by him as of the date on which the sanctions of paragraphs (c) and (d) of this section would be applied to him, such candidate shall not be subject to the sanctions of said paragraphs (c) and (d).

Mississippi Code Annotated § 23-15-813 (2000).

Civil penalties and proceedings

(a) In addition to any other penalty permitted by law, the Secretary of State shall require any candidate or political committee, as identified in Section 23-15-805(a), and any other political committee registered with the Secretary of State, who fails to file a campaign finance disclosure report as required under Sections 23-15-801 through 23-15-813, or Sections 23-17-47 through 23-17-53, or who shall file a report which fails to substantially comply with the requirements of Sections 23-15-801 through 23-15-813, or Sections 23-17-47 through 23-17-53, to be assessed a civil penalty as follows:

(i) Within five (5) calendar days after any deadline for filing a report pursuant to Sections 23-15-801 through 23-15-813, or Sections 23-17-47 through 23-17-53, the Secretary of State shall compile a list of those candidates and political committees who have failed to file a report. The Secretary of State shall provide each candidate or political committee,

who has failed to file a report, notice of the failure by first-class mail.

(ii) Beginning with the tenth calendar day after which any report shall be due, the Secretary of State shall assess the delinquent candidate and political committee a civil penalty of Fifty Dollars ($50.00) for each day or part of any day until a valid report is delivered to the Secretary of State, up to a maximum of ten (10) days. However, in the discretion of the Secretary of State, the assessing of the fine may be waived in whole or in part if the Secretary of State determines that unforeseeable mitigating circumstances, such as the health of the candidate, interfered with timely filing of a report. Failure of a candidate or political committee to receive notice of failure to file a report from the Secretary of State is not an unforeseeable mitigating circumstance, and failure to receive the notice shall not result in removal or reduction of any assessed civil penalty.

(iii) Filing of the required report and payment of the fine within ten (10) calendar days of notice by the Secretary of State that a required statement has not been filed, constitutes compliance with Sections 23-15-801 through 23-15-813, or Sections 23-17-47 through 23-17-53.

(iv) Payment of the fine without filing the required report does not in any way excuse or exempt any person required to file from the filing requirements of Sections 23-15-801 through 23-15-813, and Sections 23-17-47 through 23-17-53.

(v) If any candidate or political committee is assessed a civil penalty, and the penalty is not subsequently waived by the Secretary of State, the candidate or political committee shall pay the fine to the Secretary of State within ninety (90) days of the date of the assessment of the fine. If, after one hundred twenty (120) days of the assessment of the fine the payment for the entire amount of the assessed fine has not been received by the Secretary of State, the Secretary of State

shall notify the Attorney General of the delinquency, and the Attorney General shall file, where necessary, a suit to compel payment of the civil penalty.

(b)(i) Upon the sworn application, made within sixty (60) calendar days of the date upon which the required report is due, of a candidate or political committee against whom a civil penalty has been assessed pursuant to paragraph (a), the Secretary of State shall forward the application to the State Board of Election Commissioners. The State Board of Election Commissioners shall appoint one or more hearing officers who shall be former chancellors, circuit court judges, judges of the Court of Appeals or justices of the Supreme Court, and who shall conduct hearings held pursuant to this article. The hearing officer shall fix a time and place for a hearing and shall cause a written notice specifying the civil penalties that have been assessed against the candidate or political committee and notice of the time and place of the hearing to be served upon the candidate or political committee at least twenty (20) calendar days before the hearing date. The notice may be served by mailing a copy thereof by certified mail, postage prepaid, to the last known business address of the candidate or political committee.

(ii) The hearing officer may issue subpoenas for the attendance of witnesses and the production of books and papers at the hearing. Process issued by the hearing officer shall extend to all parts of the state and shall be served by any person designated by the hearing officer for the service.

(iii) The candidate or political committee has the right to appear either personally, by counsel or both, to produce witnesses or evidence in his behalf, to cross-examine witnesses and to have subpoenas issued by the hearing officer.

(iv) At the hearing, the hearing officer shall administer oaths as may be necessary for the proper conduct of the

hearing. All hearings shall be conducted by the hearing officer, who shall not be bound by strict rules of procedure or by the laws of evidence in the conduct of the proceedings, but the determination shall be based upon sufficient evidence to sustain it. The scope of review at the hearing shall be limited to making a determination of whether failure to file a required report was due to an unforeseeable mitigating circumstance.

(v) Where, in any proceeding before the hearing officer, any witness fails or refuses to attend upon a subpoena issued by the commission, refuses to testify, or refuses to produce any books and papers the production of which is called for by a subpoena, the attendance of the witness, the giving of his testimony or the production of the books and papers shall be enforced by any court of competent jurisdiction of this state in the manner provided for the enforcement of attendance and testimony of witnesses in civil cases in the courts of this state.

(vi) Within fifteen (15) calendar days after conclusion of the hearing, the hearing officer shall reduce his or her decision to writing and forward an attested true copy of the decision to the last known business address of the candidate or political committee by way of United States first-class, certified mail, postage prepaid.

(c)(i) The right to appeal from the decision of the hearing officer in an administrative hearing concerning the assessment of civil penalties authorized pursuant to this section is granted. The appeal shall be to the Circuit Court of Hinds County and shall include a verbatim transcript of the testimony at the hearing. The appeal shall be taken within thirty (30) calendar days after notice of the decision of the commission following an administrative hearing. The appeal shall be perfected upon filing notice of the appeal and by the prepayment of all costs, including the cost of the preparation of the record of the proceedings by the hearing officer, and the filing of a bond in the sum of Two Hundred Dollars ($200.00), conditioned that if the decision of the hearing

officer be affirmed by the court, the candidate or political committee will pay the costs of the appeal and the action in court. If the decision is reversed by the court, the Secretary of State will pay the costs of the appeal and the action in court.

(ii) If there is an appeal, the appeal shall act as a supersedeas. The court shall dispose of the appeal and enter its decision promptly. The hearing on the appeal may be tried in vacation, in the court's discretion. The scope of review of the court shall be limited to a review of the record made before the hearing officer to determine if the action of the hearing officer is unlawful for the reason that it was 1. not supported by substantial evidence, 2. arbitrary or capricious, 3. beyond the power of the hearing officer to make, or 4. in violation of some statutory or constitutional right of the appellant. The decision of the court may be appealed to the Supreme Court in the manner provided by law.

(d) If, after forty-five (45) calendar days of the date of the administrative hearing procedure set forth in paragraph (b), the candidate or political committee identified in paragraph (a) of this section fails to pay the monetary civil penalty imposed by the hearing officer, the Secretary of State shall notify the Attorney General of the delinquency. The Attorney General shall investigate the offense in accordance with the provisions of this chapter, and where necessary, file suit to compel payment of the unpaid civil penalty.

(e) If, after twenty (20) calendar days of the date upon which a campaign finance disclosure report is due, a candidate or political committee identified in paragraph (a) of this section shall not have filed a valid report with the Secretary of State, the Secretary of State shall notify the Attorney General of those candidates and political committees who have not filed a valid report, and the Attorney General shall thereupon prosecute the delinquent candidates and political committees.

Mississippi Code Annotated § 23-15-1021 (2000).

Judicial office donation limits

It shall be unlawful for any individual or political action committee not affiliated with a political party to give, donate, appropriate or furnish directly or indirectly, any money, security, funds or property in excess of Two Thousand Five Hundred Dollars ($2,500.00) for the purpose of aiding any candidate or candidate's political committee for judge of a county, circuit or chancery court or in excess of Five Thousand Dollars ($5,000.00) for the purpose of aiding any candidate or candidate's political committee for judge of the Court of Appeals or justice of the Supreme Court, or to give, donate, appropriate of furnish directly or indirectly, any money, security, funds or property in excess Two thousand Five Hundred Dollars ($2,500.00) to any candidate or the candidate's political committee for judge of a county, circuit of chancery court or in excess of Five Thousand Dollars ($5,000.00) for the purpose of aiding any candidate or candidate's political committee for judge of the Court of Appeals or justice of the Supreme Court, as a contribution to the expense of a candidate for judicial office.

Mississippi Code Annotated § 97-13-15 (2000).

Prohibited political contributions by corporations

It shall be unlawful for any corporation, incorporated company or incorporated association, by whatever name it may be known, incorporated or organized under the laws of this state, or doing business in this state, or for any servant, agent, employee or officer thereof, to give, donate, appropriate or furnish directly or indirectly, any money, security, funds or property of said corporation, incorporated company or incorporated association, in excess of One Thousand Dollars ($1,000.00) per calendar year for the purpose of aiding any political party of any candidate for any public office, or any candidate for any nomination for any

public office of any political party, or to give, donate, appropriate or furnish, directly or indirectly, any money, security, funds or property of said corporation, incorporated company or association in excess of One Thousand Dollars ($1,000.00) to any committee or person as a contribution to the expense of any political party or any candidate, reprehensive or committee of any political party or candidate for nomination by any political party, or any committee or other person acting in behalf of such candidate. The limit of One Thousand Dollars ($1,000.00) for contributions to political parties, candidates and committees or other persons acting in behalf such candidates shall be an annual limitation applicable to each calendar year.

Mississippi Code Annotated: § 97-13-17 (2000).

Penalty for illegal corporate contributions

Any corporation, incorporated company or incorporated association, or agent, officer or employee violating any of the provisions of section 97-13-15 shall, upon conviction, be fined not less than one thousand dollars ($1,000.00) nor more than five thousand dollars ($5,000.00).

IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

No. [2000-M-01839]

IN RE: CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Petitioner.

MOTION FOR STAY OF PROCEEDINGS PENDING DISPOSITION OF PETITION FOR INTERLOCUTORY APPEAL

Petitioner Chamber of Commerce of the United States of America ("the U.S. Chamber") has filed this day its petition for interlocutory appeal by permission or, in the alternative, for writ of mandamus or prohibition ("the petition"). Petitioner respectfully moves this Court. pursuant to M.R.A.P. 5(e) and 8(c), for a stay, pending resolution of the petition, of the injunctive relief ordered by the Chancery Court of the First Judicial District of Hinds County in its order dated November 3, 2000, requiring petitioner to cease all advertisements concerning Judge Frank G. Vollor and Justice Jim Smith.

In support of this motion, petitioner would show unto the Court the following:

A. Facts Relevant To The Need For A Stay Of All Proceedings

This fall, the U.S. Chamber has independently sponsored a series of television advertisements concerning candidates for judicial office in several states. As a part of that effort, on

October 17, 2000, the U.S. Chamber began airing television advertisements in Mississippi to inform the public about the experience of certain candidates for the Mississippi Supreme Court regarding particular issues of public importance, such as the administration of criminal law.

The Attorney General and Secretary of State believed that these expenditures subjected the U.S. Chamber to the reporting requirements of Miss. Code Ann. § 23-15-801 *et seq*. The U.S. Chamber disagreed and filed suit in federal court seeking a declaration that four of the advertisements were not "express advocacy" under Buckley v. Valeo, 424 U.S. 1 (1976), and therefore were not subject to state regulation. Following an expedited hearing, Judge Wingate of the Southern District of Mississippi disagreed. He held that the four advertisements at issue were express advocacy, and so were outside Buckley's protections from state regulation. See United States Chamber of Commerce v. Moore, No. 3:00-CV-778WS, memorandum opinion at 27 (S.D.Miss. Nov. 2. 2000).

On November 3. Judge Frank G. Vollor obtained the present temporary restraining order forbidding the broadcast of the U.S. Chamber's advertisements concerning either his candidacy or that of his opponent, Justice Jim Smith of the Supreme Court. His application to the Chancellor is attached to the petition as Exhibit A. The Chancellor's temporary restraining order is attached to the petition as Exhibit B. The U. S. Chamber's petition for interlocutory appeal and stay pending appeal is attached to the petition as Exhibit C.

B. The Standard for Granting a Stay

This Court has authority to grant a stay of all proceedings pending an interlocutory appeal. M.R.A.P. 5(e). The standard for granting a stay pending appeal requires that:

> (A) the applicant make a strong showing that he is likely to succeed on the merits of the appeal; (B) the

> appellant establish that unless a stay is granted he will suffer irreparable injury; (C) no substantial harm will come to other interested parties; (D) a stay would do no harm to the public interest.

Board of Trustees of the Jackson Public School District v. Knox, 638 So.2d 1278, 1281 (Miss. 1994) (quoting Official Comment to Rule 62); *see* M.R.A.P. 8(c); M.R.C.P. 62(c); M.R.C.P. 62(g).

These factors are not to be applied in a rigid, mechanical fashion. *United States* v. *Baylor University Medical Center*, 711 F.2d 38, 39 (5th Cir. 1983) (interpreting identical federal rule). Rather, there is a "sliding scale" approach to the four factors—where an especially strong showing is made on one of the factors, a lesser showing is required on the others. *Id.; Ruiz v. Estelle*. 650 F 2d 555, 565 (5th Cir. 1981); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).[1]

Specifically, a finding of "likelihood of success on the merits" does not require a mathematical probability of reversal. *Ruiz*, *supra*, 650 F.2d at 565. Rather, this first consideration weighs heavily in favor of a stay where the appeal raises questions "so serious, substantial, difficult, and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Holiday Tours*, *supra*, 559 F.2d at 844.

C. The factors as applied in this case

As set forth more fully in the petition, the petitioners have strong support for their argument that the Chancellor's

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[1] This Court conducts a de novo determination of the propriety of a stay pending appeal, even where the trial judge has considered, and denied, a similar request for stay. *Knox*, *supra*. This is appropriate, since the power to grant a stay pending appeal is vested separately and concurrently in both the trial courts under M.R.C.P. 62(c) and this Court under M.R.C.P. 62(g) and M.R.A.P. 8(c).

injunctive relief should be overturned. It is plainly a prior restraint violating the First Amendment. In Republican Party of Florida v. Florida Elections Commission, 658 So.2d 653 (Fla. Dist. Ct. App. 1995), the Court held that, even where an advertisement was financed by illegal campaign contributions, its broadcast could not be enjoined. The U.S. Chamber will suffer immediate and irreparable harm if not allowed to advertise regarding candidates for judicial election. "It is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Hohe v. Casey, 868 F.2d 69, 72, 73 (3d Cir. 1989). "[T]he harm to plaintiffs from the infringement of their rights under the First Amendment clearly outweighs any purported interest of the defendant." *ACLU v. Reno,* 31 F.Supp.2d 473, 497-98 (E.D.Pa. 1999).

WHEREFORE, PREMISES CONSIDERED, petitioner respectfully moves this Court to stay the TRO entered by the Chancery Court, as well as all further proceedings in that Court, pending resolution of the petition.

Respectfully submitted,

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

By: /s/ _____

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IN THE CHANCERY COURT
OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

NO. G2000-2128 S/2

FRANK G. VOLLOR,

Plaintiff,

vs.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WABG-TV, GREENVILLE, MS; WXVT-TV, GREENVILLE, MS; WAPT-TV, JACKSON, MS; WJTV-TV, JACKSON, MS; WLBT-TV, JACKSON, MS; WDBD-TV, JACKSON, MS; WTOK-TV, MERIDIAN, MS; AND WCBI-TV, COLUMBUS, MS,

Defendants.

TRANSCRIPT OF PROCEEDINGS HELD IN THE ABOVE STYLED AND NUMBERED CAUSE BEFORE THE HONORABLE WILLIAM H. SINGLETARY, CHANCELLOR, ON THE 3RD DAY OF NOVEMBER, 2000.

* * * *

Counsel for Plaintiff:

Now, just for the record and for the Court to hear our side of it, I think it's clear that the only reason we're here at the last minute is because of the Chamber's continuing action to say that it is not subject to Mississippi law. To support that action, they chose the forum. They asked for declaratory relief in the U.S. District Court some two weeks ago. There was nothing, I guess, that could be done since they had raised

an issue that they had some free speech exclusion from Mississippi law, some privilege, etc., etc. It was only yesterday that the U.S, District Court, Judge Henry Wingate, filed his ruling, which is attached as a part of our application for a temporary restraining order, where he finds that such is not the case, that what they are doing is just not even real thinly veiled, but—those words were used in it somewhere—these advertisements that we're complaining of by the Chamber do not discuss issues. They are merely campaign ads on behalf of Jim Smith or against Frank Vollor, the only two candidates in this election.

* * * *

Mr. Pyle: Excuse us just a second, Your Honor.

(PAUSE IN THE PROCEEDINGS WHILE MR. LOYACONO AND MR. PYLE CONFERRED BRIEFLY)

Counsel for Plaintiff: Your Honor, since the Court did require us and asked us to notify Mr. Wallace, Mr. Wallace did make an announcement to the Court that he was appearing specially only for some limited purposes. Now, Mr. Pyle has pointed out rightfully that special appearances under the Mississippi Rules of Civil Procedure are limited only for the purpose of jurisdictional protests. So if he's going to argue as to the merits of this case, then I think it is necessary that he--and the Chamber, of course, him acting for the Chamber--accept the jurisdiction of this Court, not waltz in, be able to tiptoe around and argue merits but say, Oh, we're really not here. So if he's going to argue as to merits, anything but jurisdiction, then I think the Chamber is required to accept the jurisdiction of this Court over it.

* * * *

Counsel for the Chamber:

I do want to say that it has never been the position of the Chamber of Commerce of the United States that it is not subject to Mississippi law. It has always been the position of the Chamber of Commerce that it is in compliance with Mississippi law. That is what we have argued before Judge Wingate, and that is what we argue to the Court today. Although Mr. Loyacono has referred to the advertisements before the Court as being illegal, I do not see any allegation in his application nor did I hear any statement in his argument in what way they are illegal. There is a suggestion that we have breached the contribution limits. What Judge Wingate found yesterday is that these advertisements constitute express advocacy. Express advocacy is part—excuse me, Your Honor—of the definition of independent expenditure under the statute. And for the Court's information, that definition is found at Section 23-15-801(j). Assuming that Judge Wingate's opinion is correct, that these advertisements do constitute independent expenditures, they are in no way illegal. There is no limit on the amount of money that can be spent on independent expenditures in Mississippi. None whatsoever. There are certain reporting requirements that go along with independent expenditures, if that's what they are, but I have heard no argument from counsel as to what reporting requirements, if any, the Chamber may have breached. In fact, as we read the statute, we have not breached any reporting requirements. No report is due until January the 10th, as we read the statute. So there's nothing illegal about the ads. There have been no contributions made, and there is nothing that I've heard that suggests that anything is illegal.

* * * *

Judge Wingate has issued an opinion. He has not issued a judgment as of half an hour ago when I called over there. The matter is still before Judge Wingate.

* * * *

And my last point, Your Honor, is: If I'm wrong about Mississippi law, if I'm wrong about the jurisdiction of this Court, if I'm wrong about the standing of Judge Vollor to be here in the first place as opposed to over in front of Judge Wingate, then we come squarely to the First Amendment of the Constitution of the United States, which quite plainly prohibits the restraint of speech except in cases such as the movement of troops, ships, and great public necessity. The issue of whether a campaign ad funded by an illegal contribution can be enjoined, that has been litigated.

* * * *

And in the case of the *Republican Party of Florida vs. Florida Election Commission,* the court quite squarely held that, "We conclude the issuance of an injunction under such circumstances constitutes an unconstitutional prior restraint of speech. Our freedom of speech is much too important to permit such prior restraint under the circumstances."

IN THE CHANCERY COURT OF
HARRISON COUNTY, MISSISSIPPI

CAUSE NO._____

OLIVER E.DIAZ,JR.,

Plaintiff,

VERSUS

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA;
WLOX-TV, GULFPORT/BILOXI, MS;
WDAM-TV, HATTIESBURG, MS,

Defendants.

TEMPORARY RESTRAINING ORDER

CAME the Applicant, Oliver E. Diaz, Jr., through counsel and by affidavit as required by Rule 65 MRCP, and the Court, having heard the argument of counsel and being advised in the premises, including the affidavits of the Applicant and his counsel, finds that the relief sought should be granted. The Court find, orders and adjudges as follows:

1. The Court finds that it has jurisdiction for the purposes of a Rule 65 motion.

2. The Court notes that Plaintiff's counsel contacted this judge on Saturday afternoon and that the Court, having heard the ex parte motion, was able to contact 3 of the district's four Chancellors and discuss the merits of the application; further, the Court believes there is sufficient merit to the injunction application to issue this order.

3. The Court grants this order without notice because there is insufficient time to notify all parties and schedule a

hearing for the following reasons: Plaintiff has alleged a failure to comply with Mississippi Election Laws by the Defendant, the Chamber of Commerce of the United States of America; Plaintiff has alleged litigation in federal courts to decide the question of whether Defendant Chamber of Commerce was subject to Mississippi Election Laws regarding contributions was not decided by the Court of its choosing until November 2, 2000, only two business days prior to the election.

4. The Court finds that Plaintiff has alleged that irreparable and immediate harm would accrue to Oliver E. Diaz, Jr., as his campaign would be subject to unfair television advertisements in support of his opponent, Keith Starrett, contrary to Mississippi Election Laws due to the shortness of time remaining before the election and his inability to lawfully match the financial contributions of television advertising of the Chamber of Commerce of the United States of America on behalf of his opponent.

IT IS THEREFORE, ORDERED AND ADJUDGED AS FOLLOWS:

1. ORDERED AND ADJUDGED, that each of the Defendants, their agents, servants, and employees are hereby enjoined from transmitting any television advertisement which is paid for or produced by the Chamber of Commerce of the United States of America, its agents, servants, or employees, in support of Keith Starrett and against Oliver E. Diaz, Jr., concerning the Southern District election for the Supreme Court of Mississippi. Specifically, Separate Defendant WDAM-TV, Hattiesburg, Ms., is enjoined only as to television transmission into Harrison County, Hancock County, and Stone County, all within this Court's district.

2. ORDERED AND ADJUDGED, that the Applicant is hereby required to post with this Court a bond in the amount of One Thousand Dollars ($1,000.00), and this Order shall be

immediately binding on the parties on the 4th day of November, 2000, as of 2:30 pm., and service upon each Defendant may be had herein by mail, telephone, facsimile, or by actual notice otherwise.

3. ORDERED AND ADJUDGED, that the Court sets this matter for review on Monday, November 6, 2000, at 1:30 p.m., at the Gulfport Courthouse, should any Defendant feel aggrieved by this injunction; however, unless therein set aside, this Order shall expire ten (10) days after entry or after further Order of this Court pursuant to Rule 65.

SO ORDERED, this the 4th day of November, 2000, at 2:30 p.m.

/s/ _____
CHANCELLOR

IN THE CHANCERY COURT
OF THE FIRST JUDICIAL DISTRICT OF
JONES COUNTY, MISSISSIPPI

CAUSE NO. [2000-0204-E]

BILLY JOE LANDRUM

Petitioner

Versus

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA WDAM, WLOX, WLIBT AND OTHER NEWS MEDIA

Respondents

TEMPORARY RESTRAINING ORDER

THIS CAUSE came on to be heard on VERIFIED COMPLAINT of the Petitioner, Billy Joe Landrum, and the Court after having heard said COMPLAINT herein and being advised in the premises is of the opinion and doth find that sufficient cause exists for the entry of a Temporary Restraining Order as hereinafter set forth.

1. That the Chamber of Commerce, of the United States of America has purchased political advertisements promoting an opponent of the Petitioner, said ads being in violation of §23-15-1021 of the Mississippi Code, annotated is emended.

2. That the violation of said section his been found in an Opinion written by the Honorable Henry T. Wingate, Federal District Judge for the Southern District of Mississippi Jackson Division.

3. That the election for which these advertisements were purchased, is scheduled for Tuesday, November 7, 2000, and unless this Court enters a Temporary

Restraining Order, there will be immediate and irreparable injury, loss and damages to the Petitioner as a result of the instant advertisements being broadcast in violation of the previously identified statute.

IT IS THEREFORE ORDERD, ADJUDGED AND DECREED that the Respondents, the Chamber of Commerce of the United States of America, WDAM, WLOX, WLBT and other news media and televisions stations are hereby restrained and enjoined from creating, broadcasting or publishing within the jurisdiction of this Court are hereby temporarily enjoined from broadcasting or publishing any paid advertisements concerning the race for the Supreme Court in which the name of the Petitioner, Billy Joe Landrum.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED the prior notice is impractical due to the fact that the election for which the advertisements are aimed is Tuesday, November 7, 2000, and there is therefore not sufficient time to give notice to the Respondents, but the Court orders a hearing to be set on whether or not this injunction should become permanent on the 8th day of November, 2000, at 9:00 a.m.

IT IS FURTHER ORDERZD, ADJUDGED AND DECREED that the Petitioner shall surrender a cash bond unto the Court in the amount of $500.00

SO ORDERED, ADJUDGED AND DECREED on this 5th day of November, 2000, at 3:00 pm.

/s/ _____
Chancellor

Submitted By

/s/ _____
Thomas T. Buchanan-Bar #7022

IN THE CHANCERY COURT
OF THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

No. G2000-2137 S/2

WILLIAM A. PYLE,
A CITIZEN OF MISSISSIPPI,
Plaintiff,

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WABG-TV, GREENVILLE, MS; WXVT-TV, GREENVILLE, MS; WAPT-TV, JACKSON, MS; WJTV-TV, JACKSON, MS; WLBT-TV, JACKSON, MS; WDBD-TV, JACKSON, MS; WTOK-TV, MERIDIAN, MS; WCBI-TV, COLUMBUS, MS; WLOX-TV, BILOXI; WDAM-TV, HATTIESBURG; WHLT-TV, HATTIESBURG; WTVA-TV, TUPELO; WLOV-TV, TUPELO; WMC-TV, MEMPHIS; WREG-TV, MEMPHIS; AND WPTY-TV, MEMPHIS
Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

THIS CAUSE is before the Court on Plaintiff's Motion for Temporary Restraining Order. Having reviewed the motion, the Court is of the opinion that the motion is well taken and is, therefore, granted.

The Court has reviewed all relevant filings, all relevant case law, and has held hearings on a related case, but a case with different parties and issues. Based upon this information, including the Affidavit of the Plaintiff and his attorney, the Court is satisfied that a Temporary Restraining

Order Without Notice is within the interest of equity. The Court finds that this Plaintiff will be irreparably and immediately harmed in the absence of immediate equitable relief by this Court. The illegal television advertisements of the Chamber of Commerce of the United States of America (hereinafter "Chamber") clearly support certain judicial candidates throughout the State of Mississippi and clearly identify and intend to defeat certain other judicial candidates throughout the State of Mississippi.

This Court takes judicial notice of the fact that those judicial candidates being supported by the Chamber ads have publicly announced their opposition to these ads and have all asked that the Chamber no longer run these ads. These advertisements clearly affect public opinion and voting decisions, and thus result in an immediate harm to the Plaintiff, who seeks fair elections throughout the State, elections held in compliance with applicable Mississippi statute. This Plaintiff will not be remedied by the imposition of criminal fines and charges in accordance with election statues, therefore, Defendants are incorrect in their assertion that this Court may not restrain an action which may be criminally punished at a later date. Criminal punishment is not the purpose of this Court; instead, this Court's purpose is to halt the harm done to the Plaintiff, immediately, before further harm occurs.

The Defendant, Chamber, is clearly doing business in the State of Mississippi by admittedly investing over $400,000.00 in television ads to this judicial campaign and otherwise. Further, the Chamber has impliedly consented to Mississippi jurisdiction, as well as actually committed itself to Mississippi jurisdiction by an appeal on the merits from a former order of this Court. The Court in this case finds that this is clearly instance where the Defendant, Chamber, is subject to Mississippi Election Laws as well as obviously and openly trying to influence the judicial elections of this state

by touting particular candidates and seeking the defeat of other candidates. That the candidates are few in number and are clearly identifiable. These expenditures are indirect expenditures which are subject to the contribution limits and reporting requirements of Mississippi Code Annotated Section 23-15-801. Chamber has admittedly violated the spending limits of that section, and while having taken the position that it might be subject to criminal prosecution, this Court finds that the relief sought by the Plaintiff is so narrowly crafted in order to achieve the proper legal result, and that it is the least restrictive means of enforcement of the applicable laws. The Court is further impressed by the fact that even the recipients of the Chamber ads have openly and clearly called for the Chamber to cease and desist running its ads.

THEREFORE, it is ordered that each of the Defendants, their agents, servants, employees, attorneys, or those in active concert with them, are hereby enjoined from contracting to transmit or transmitting any television advertisements which are paid for, produced, or furnished by the Chamber of Commerce of the United States of America, its agents, servants, or employees, concerning judicial elections within the State of Mississippi in November, 2000.

This order shall take effect and be binding immediately upon the filing of a bond in the amount of $100. and shall expire ten days after entry, or after further order of this Court, whichever is sooner.

SO ORDERED, ADJUDGED, AND DECREED, this the 6th day of November, 2000.

/s/ _____

CHANCELLOR WILLIAM HALE SINGLETARY

IN THE CHANCERY COURT
OF HINDS COUNTY, MISSISSIPPI

No. [G-2000-2128 S/2]

FRANK G. VOLLOR

Plaintiff

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WABG-TV, GREENVILLE MS; WXVF-TV, GREENVILLE, MS; WAPT-TV, JACKSON, MS; WJTV-TV, JACKSON, MS; WLB-TV, JACKSON, MS; WDBD-TV, JACKSON, MS; WTOK-TV, MERIDIAN, MS; and WCBI-TV, COLUMBUS, MS

Defendants

APPLICATION FOR TEMPORARY RESTRAINING ORDER

COMES NOW the Plaintiff, Frank G. Vollor, and applies for a Temporary Restraining Order against the above-named Defendants, and in support of his application for a Temporary Restraining Order would show unto this Court the following:

I.

The Application involves the contracting between the Chamber of Commerce of the United States of America, hereinafter referred to as "Chamber", and the other defendant television stations. The defendant television stations have as their principal place of business the Central Judicial District of the State of Mississippi, wherein an election is being contested for a seat on the Mississippi Supreme Court between Jim Smith and Frank Vollor, your Plaintiff herein.

In the absence of immediate equitable relief there will be irreparable harm to the Plaintiff. With every transmission or

communication of television advertising paid for by the Chamber, public opinion is being affected and voting decisions by the viewers of those illegal advertisements are being determined. The election day is November 7, 2000.

II.

The television ads on behalf of Jim Smith by the Chamber of Commerce of the United States of America are indirect expenditures which are subject to the contribution limits and reporting requirements of Mississippi Code Annotated, Section 23-15-801. (See the opinion of Honorable Henry T. Wingate, which is attached.) The Chamber of Commerce of the United States of America has violated the spending limit provision of the Mississippi Election Laws which cap individual expenditures at $5,000.00 per person or $1,000.00 per corporation. The Chamber of Commerce of the United States of America is a non-profit corporation which operates in Washington, D.C.

III.

That upon a further evidentiary hearing for a preliminary injunction, there is an overwhelming likelihood that this Court will also find these expenditures illegal and, thus, grant the relief sought herein. On November 2, 2000, the United States District Court, U.S. District Judge Henry T. Wingate, filed its Memorandum Opinion and Order. That Order ruled that the advertisements on behalf of Judge Jim Smith clearly express advocacy and are offensive under applicable law, *Buckley v. Valeo,* 424 US 1, 96 Supreme Court, 612 (1976). Judge Wingate found that the Defendant, Chamber, was subject to Mississippi Election Laws concerning television ads communicated in this particular Supreme Court race between the Plaintiff and Judge Jim Smith.

IV.

The Plaintiff, Frank G. Vollor, is asking this Court for the immediate enforcement of Mississippi Election Laws. The relief sought is narrowly crafted in order to achieve the proper legal result and constitutes the least restrictive means to bring the Chamber of Commerce of the United States of America into compliance with Mississippi law and enjoin its continued violation of Mississippi Election Law. Those television and communication defendants who contracted with the Chamber or its agents, servants, and employees to communicate this illegal advertising should also be enjoined from accepting these ads or communicating these ads in any way to the public by any method of transmission.

V.

This Court should immediately enter its Order enjoining the Chamber of Commerce of the United States of America and all other defendant television stations from airing those television commercials being aired and paid for by the Chamber in support of Justice Jim Smith or against the election of Judge Frank Vollor. This Order should go into effect immediately, without further delay or immediate and irreparable injury, loss, and damage will result to Frank G. Vollor, your Applicant herein, before the adverse parties or their attorneys can be heard in opposition. (See Affidavit of Frank G. Vollor, which is attached.)

VI.

The Defendant, Chamber, is the cause of this emergency time constraint because of its failure to comply with Mississippi law and then its application to the United States District Court for Declaratory Relief, which was just issued on November 2, 2000, as shown by attached exhibit.

VII.

The Affidavit of the Attorney for Applicant is attached hereto and made a part hereof, as required by Rule 65 MRCP.

VIII.

There will be no loss to the Chamber, the primary Defendant, and there can be no loss to the communication defendants for being restrained from running ads not in compliance with or in violation of Mississippi Election Laws. In any event, only a minimal bond should be required.

IX.

For these and other reasons orally presented to the Court, the within relief should be granted without notice.

RESPECTFULLY SUBMITTED, this the 3rd day of November, 2000.

/s/ _____
PAUL KELLY LOYACONO

RULE 65 AFFIDAVIT OF ATTORNEY

STATE OF MISSISSIPPI

COUNTY OF WARREN

1. I, Paul Kelly Loyacono, am attorney for the Plaintiff in the Application of Frank G. Vollor for a Temporary Restraining Order.

2. The list of television stations in my possession has only the address and general manager and I do not know the attorney for the Chamber of Commerce of the United States of America or its address, except Washington, D.C.

3. That the Applicant, Frank G. Vollor, furnished me with the Order of this date signed by U.S. District Court Judge Henry T. Wingate, who found that the Chamber of Commerce of the United States of America was subject to the election laws of this state.

4. That there is no time to notify all Defendants, as the Order of Judge Wingate was not signed until this day, and it was the Chamber of Commerce of the United States of America which brought the Action for Declaratory Relief in his Court. There are remaining only two (2) business days until the election of November 7, 2000.

5. Notice should not be required because this immediate relief is made necessary by the failure of the Chamber of Commerce of the United States of America to abide by Mississippi Election Laws. The Chamber of Commerce of the United States of America had filed for Declaratory Judgment on the question of whether it was subject to Mississippi Election Laws, and it chose the time and forum for that decision, which was just rendered this day by the U.S. District Court for the Southern District of Mississippi.

6. The cause of there not being adequate time for notice is only the fault of the Defendant. the Chamber of Commerce of the United States of America, and at no fault of the Plaintiff, Frank G. Vollor, or his attorney.

WITNESS MY SIGNATURE, this the 2nd day of November, 2000.

/s/ _____
PAUL KELLY LOYACONO

IN THE CHANCERY COURT
OF HINDS COUNTY, MISSISSIPPI

No. G2000-2137 S/2

WILLIAM A PYLE, A CITIZEN OF MISSISSIPPI
Plaintiff

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WABG-TV, GREENVILLE, MS; WXVF-TV, GREENVILLE, MS; WAPT-TV, JACKSON, MS; WJTV.TV, JACKSON, MS; WLBTTV, JACKSON, MS; WDBD-TV, JACKSON, MS; WTOK-TV, MERIDIAN, MS; and WCBI-TV, COLUMBUS, MS; WLOX-TV, BILOXI; WDAM-TV, HATTIESBURG; WHLT-TV, HATTIESBURG; WTVA-TV, TUPELO; WLOV-TV, TUPELO; WMC-TV, MEMPHIS; WREG-TV, MEMPHIS AND WPTY-TV, MEMPHIS
Defendants

APPLICATION FOR TEMPORARY
RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

COMES NOW the Plaintiff, William A. Pyle, and applies for a Temporary Restraining Order against the above-named Defendants, and in support of his application for a Temporary Restraining Order would show unto this Court the following:

I.

The Application involves the contracting between the Chamber of Commerce of the United States of America, hereinafter referred to as "Chamber", and the various television stations throughout this state. The defendant television stations have as their principal place of business the

State of Mississippi. where in a statewide election is being contested for seats on the Mississippi Supreme Court.

In the absence of immediate equitable relief there will be irreparable harm to the Plaintiff, as well as to other citizens of this state. With every transmission or communication of television advertising paid for by the Chamber, public opinion is being affected and voting decisions by the viewers of those illegal advertisements are being determined. The Plaintiff and countless other citizens will be harmed because the illegal advertisements by the Defendant, Chamber, adversely affect the Plaintiff's right as a citizen of the State of Mississippi and the United States of America to participate in a fair and impartial election process. The election day is November 7, 2000. The Plaintiff wishes only that the election laws of the Sovereign State of Mississippi be upheld. and enforced.

II.

This Court has jurisdiction over the parties for the purpose of this Petition for a Temporary Restraining Order. At least three (3) defendant television stations have their principal place of business in this district. The Chamber has appeared in this Court and later in the Mississippi Supreme Court appealing a former Order of this Court on the merits of this Court's rulings involving related but different issues. The Chamber has become subject to this Court's jurisdiction by admittedly doing business within this district and spending hundreds of thousands of dollars contracting with the defendant television stations in an illegal attempt to manipulate judicial elections through its own unregulated, unsolicited, and uncontrolled advertisements for or against judicial candidates for election to the Mississippi Supreme Court.

III.

The television ads on behalf of judicial candidates supported by the Chamber of Commerce of the United States of America are indirect expenditures which are subject to the contribution limits and reporting requirements of Mississippi Code Annotated, Section 23-15-801. (The opinion of Honorable Henry T. Wingate, which is made a part hereof by reference.) The Chamber of Commerce of the United States of America has violated the spending limit provision of the Mississippi Election Laws which cap individual expenditures at $5,000.00 per person or $1,000.00 per corporation.

IV.

That upon a further evidentiary hearing for a preliminary injunction, there is an overwhelming likelihood that this Court will also find these expenditures illegal and, thus, grant the relief sought herein. On November 2, 2000, the United States Distinct Court, U.S. District Judge Henry T. Wingate. filed its Memorandum Opinion and Order. That Order ruled that the advertisements on behalf of certain candidates clearly express advocacy and are offensive under applicable law, *Buckley v. Valeo*, 424 US 1. 96 Supreme Court, 612 (1976). Judge Wingate found that the Defendant, Chamber, was subject to Mississippi Election Laws concerning television ads for which it paid and which it produced. The Chancery Court of Hinds County granted a Temporary Restraining Order and, upon appeal, said Order was affirmed by the Mississippi Supreme Court. (Order is attached as an exhibit.)

V.

The Plaintiff, William A. Pyle, is asking this Court for the immediate enforcement of Mississippi Election Laws. The relief sought is narrowly crafted in order to achieve the proper legal result and constitutes the least restrictive means to bring the Chamber of Commerce of the United States of America

into compliance with Mississippi law and enjoin its continued violation of Mississippi Election Law. Those television and communication defendants who contracted with the Chamber or its agents, servants, and employees to communicate this illegal advertising should also be enjoined from accepting these ads or communicating these ads in any way to the public by any method of transmission.

VI.

The rights of your Petitioner, a citizen of Mississippi, and of all the candidates for election to the Mississippi Supreme Court are being immediately and irrevocably adversely affected. Even those candidates supported by the Chamber have clearly asked the Chamber to stop running its ads.

VII.

This Court should immediately enter its Order enjoining the Chamber of Commerce of the United States of America and all other defendant television stations from airing those television commercials being aired and paid for by the Chamber in support of or against any judicial candidates. This Order should go into effect immediately, without further delay or immediate and irreparable injury, loss, and damage will result to William A. Pyle, your Applicant herein, before the adverse parties or their attorneys can be heard in opposition. (See Affidavit of William A. Pyle. which is attached.)

VIII.

The Defendant, Chamber, is the cause of this emergency time constraint because of its failure to comply with Mississippi law and its declaratory action in U.S. District Court, a forum of its own choice and which in it was unsuccessful and lost on all litigated issues.

IX.

The Affidavit of the Attorney for Applicant is attached hereto and made a part hereof, as required by Rule 65 MRCP.

X.

There will be no loss to the Chamber, the primary Defendant, and there can be no loss to the communication defendants for being restrained from running ads not in compliance with or in violation of Mississippi Election Laws. In any event, only a minimal bond should be required.

XI.

For these and other reasons orally presented to the Court. the within relief should be granted without notice.

RESPECTFULLY SUBMITTED, this the 6th day of November, 2000.

/s/ _____

PAUL KELLY LOYACONO

RULE 65 AFFIDAVIT OF ATTORNEY

STATE OF MISSISSIPPI

COUNTY OF HINDS

1. I, Paul Kelly Loyacono, am attorney for the Plaintiff in the Application of William A. Pyle for a Temporary Restraining Order.

2. The list of television stations in my possession has only the address and general Manager; and Honorable Michael Wallace, the attorney for the Chamber of Commerce of the United States of America. has received telephonic notice of filing upon the filing.

3. There is no time to notify all Defendants, as the Order of Justice Scalia was not signed until this day, and it was the Chamber of Commerce of the United States of America which brought the Motion for Stay without hearing. The election is tomorrow, November 7, 2000.

4, Notice should not be required because this immediate relief is made necessary by the failure of the Chamber of Commerce of the United States of America to abide by Mississippi Election Laws. The Chamber of Commerce of the United States of America had filed for Declaratory Judgment on the question of whether it was subject to Mississippi Election Laws, and it chose the time and forum for that decision, which was just rendered November 2, 2000, by the U.S. District Court for the Southern District of Mississippi.

5. The cause of there not being adequate time for notice is only the fault of the Defendant, the Chamber of Commerce of the United States of America, and at no fault of the Plaintiff, William A. Pyle, or his attorney.

WITNESS MY SIGNATURE, this the 6th day of November, 2000.

/s/ _____
PAUL KELLY LOYACONO

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 00-1255

(2)

Supreme Court, U.S.
FILED
MAR 13 2001
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

CHAMBER OF COMMERCE OF THE UNITED STATES,
Petitioner,

VERSUS

FRANK VOLLOR,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Mississippi

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MOTION FOR LEAVE TO FILE, OUT OF TIME, AND BRIEF OF THE STATE OF MISSISSIPPI, *AMICUS CURIAE*, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

MICHAEL C. MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

T. HUNT COLE, JR.
SPECIAL ASSISTANT ATTORNEY GENERAL
Counsel of Record
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Counsel for Amicus Curiae

23 pp

MOTION FOR LEAVE TO FILE, OUT OF TIME, THE BRIEF OF THE STATE OF MISSISSIPPI, *AMICUS CURIAE*, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The State of Mississippi respectfully moves for leave to file out of time the annexed brief *amicus curiae* in opposition to the Petition for a Writ of Certiorari. The Chamber of Commerce of the United States of America's ("Chamber's") failure to serve its petition on the Attorney General has prejudiced the State's ability to file an opposition within the time prescribed by to S. Ct. R. 15(3). The Attorney General was never served with the petition, and only on February 19, 2001, obtained a copy of the petition from a third party. The State respectfully requests leave to file its opposition as of today's date -- less than thirty days after the Attorney General received a copy of the petition.[1]

---

[1]Upon reviewing the petition, the State quickly submitted a letter to this Court and to the parties stating that the inclusion of the *Moore* decision in the *Vollor* petition was improper and notifying all parties that the Attorney General had

The State is not a party to the case of *Chamber of Commerce of the United States v. Vollor* in which petitioner seeks a writ of certiorari to the Mississippi Supreme Court. *See* Pet. at (i), 1, 12-15. However, the omnibus petition improperly seeks review of a separate federal district court decision, *Chamber of Commerce of the United States v. Moore*, regarding the constitutionality of Mississippi election disclosure statutes as applied. *See* Pet. at (i), 1, 15-21. The *Moore* case, to which the State is a party, is presently pending before the United States Court of Appeals for the Fifth Circuit.

The Chamber's failure to serve the Attorney General with its petition was in contravention of the rules of this Court. Although the petition clearly requests this Court to review the findings of the federal district court in *Moore* regarding the constitutionality of Mississippi campaign disclosure statutes as

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not received formal service of the petition. Upon further review of the petition, the State now seeks leave to file its brief in opposition to the petition.

applied to the Chamber's advertisements. *see* Pet. at 15-21. the Chamber failed to serve a copy of the petition on the Attorney General as required by the rules of this Court. *See* S. Ct. R. 29(c). Moreover, having raised the issue of the constitutionality of Mississippi statutes as applied, the Chamber was required, but failed, to notify this Court that a state's statutory right of intervention (28 U.S.C. § 2403(b)) may be applicable. *See* S. Ct. R. 29(c).

Finally, independent of Rule 29 the petitioner knew that the State of Mississippi is a party to *Moore* as both the petitioner and the State are before the court of appeals in that very matter. Having sought review of the holding of the federal district court in *Moore* in the petition, the Chamber was required, but failed, to notify the State as an interested party pursuant to S. Ct. R. 29(3) (requiring notice to each party to the proceeding of which review is sought).

Because of the State's lack of notice of the petition brought about by petitioner's failure to provide service upon the Attorney General, the State respectfully requests leave to file its *amicus curiae* brief in opposition as of today's date -- less than thirty days after the Attorney General received a copy of the petition from a third party.

March, 2001.

Respectfully submitted,

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INTRODUCTION

The State of Mississippi, through its Attorney General, respectfully submits its brief *amicus curiae* pursuant to S. Ct. R. 37 in opposition to the Petition for a Writ of Certiorari.

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America's ("Chamber's") petition for a writ of certiorari seeks review of two separate and distinct lower court opinions, each represented by a separate "question presented." The first question presented seeks review of the propriety of temporary injunctions issued by Mississippi state courts at the behest of judicial candidates. Such issues of prior restraint are present in the matter of *Chamber of Commerce of the United States v. Vollor*. Neither the State of Mississippi, nor its Attorney General or Secretary of State, are parties to the *Vollor* case.

The petition's second question presented seeks review of the decision of the United States District Court for the

Southern District of Mississippi in *Chamber of Commerce of the United States v. Moore, et al.*, (S.D. Miss. No. 3:00-cv-778ws) upholding the constitutionality of the State's election disclosure statutes as applied to the Chamber's judicial candidate advertisements. The State of Mississippi is a party to the *Moore* case which is pending, via a notice of appeal filed by the Chamber, with Court of Appeals for the Fifth Circuit (COA No. 00-60779).[1]

The State of Mississippi has a direct interest in the *Moore* matter as the State, through its Attorney General and Secretary of State, is a party to that case and the *Moore* decision upholds the constitutionality of state statutes as applied. Because the petition seeks to impermissibly combine the *Vollor* and *Moore* decisions and seeks the extraordinary review of the *Moore* decision before a judgment has been entered by the Fifth Circuit, the State submits its opposition to the petition as it pertains to *Moore*.

SUMMARY OF ARGUMENT

The Chamber's omnibus petition for a writ of certiorari impermissibly seeks review of two separate and distinct decisions issued by separate courts, regarding different issues, and which are in different stages of appellate review. *See* Pet. at (i), 1. Under the guise of seeking review of a state court decision regarding temporary injunctions (the *Vollor* case), the petition's overly expansive reach seeks review of a separate federal court decision regarding the constitutionality of Mississippi's election-disclosure statutes as applied to the Chamber's judicial candidate advertisements (the *Moore* case).

As a petition for a writ of certiorari may not seek review of judgments issued by different courts, the petition should be denied as it pertains to the federal court decision in *Moore*.

Additionally, the *Moore* decision is currently pending before the Court of Appeals for the Fifth Circuit and the Chamber's initial brief has already been submitted to that court.

Chamber's initial brief has already been submitted to that court. Pursuant to Supreme Court Rule 11, certiorari should be denied as to *Moore* as there is no extraordinary circumstance which justifies a deviation from traditional appellate procedures to forego review by the court of appeals and require immediate review by this Court.

ARGUMENT

THE PETITION SHOULD NOT BE GRANTED AS IT PERTAINS TO THE *MOORE* CASE AS *MOORE* IS A SEPARATE JUDGMENT AND NO JUSTIFICATION EXISTS FOR REMOVING *MOORE* FROM THE COURT OF APPEALS BEFORE A JUDGMENT IS ENTERED BY THAT COURT.

The Chamber's omnibus petition for a writ of certiorari impermissibly seeks review of two separate lower court judgments--*Chamber of Commerce of the United States v. Vollor*, (Mississippi Supreme Court No. 2000-M-01830), and *Chamber of Commerce of the United States v. Moore*, (S.D. Miss. No. 3:00-cv-778ws). As set forth in the first question presented, the petition seeks review of temporary injunctions issued by state courts at the behest of judicial candidates in *Vollor*.[1] *See* Pet. at (i), 1, 12-15. The *Vollor* court did not review the First Amendment issues raised in the second

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[1]The Mississippi Supreme Court denied an application by the Chamber to stay the injunction. *See* Pet. at 9. It is that decision by the State Supreme Court for which the Chamber seeks review. *See* Pet. at 2-3.

question presented, but instead relied on the *Moore* decision addressed below. *See* Pet. at 5-11. The State is not a party to *Vollor* and neither the Attorney General nor the Secretary of State played any role in that private litigation.

The second question presented seeks review of the constitutionality of the state's election disclosure statutes as applied to the Chamber's judicial candidate advertisements in light of *Buckley v. Valeo*, 424 U.S. 1 (1976), and subsequent interpretative decision. *See* Pet. at (i), 15-21. However, as the petition concedes, the constitutionality of the election disclosure statutes was not addressed or decided in *Vollor* but was, in fact, decided only in the federal district court case of *Moore*. *See* Pet. at 5-11. The federal court decision in *Moore* is limited in its scope to the constitutionality of state statutes as applied to particular candidate ads and did not address or authorize any aspect of the temporary injunctions issued by the state courts in *Vollor*.

The *Moore* case is pending before the United States Court of Appeals for the Fifth Circuit and the Chamber has already submitted its initial brief to that court. *See* Pet. at 7 n.4.

Because the *Vollor* and *Moore* decisions are different judgments by separate courts, regarding different issues and in different stages of appellate review, the Chamber's attempt to include a review of the *Moore* decision in its petition for review of *Vollor* is impermissible. Additionally, even if such inclusion was proper, *Moore* is pending before the Fifth Circuit and no extraordinary circumstance exists to justify by-passing the court of appeals for immediate review by this Court. *See* S. Ct. R. 11.

A. Certiorari Should Be Denied As To *Moore* As The Petition Must Be Limited To The Review Of A Judgment Of One Court.

As is evident in the petition, the *Moore* and *Vollor* judgments were issued by different courts and decided separate and distinct legal issues. Inclusion of the *Moore* case in the *Vollor* petition is improper as judgments by separate courts

must be advanced in separate petitions no matter how identical or related the questions involved. *See* S. Ct. R. 12(4) (allowing only similar judgments from same court to be combined); *see also* Robert L. Stern et al., *Supreme Court Practice*, 328 (7th ed. 1993) ("Judgments entered by separate courts are considered to be different cases for purposes of Supreme Court review.")

The *Moore* decision referenced in the second question presented, upheld the constitutionality of the state's election reporting statutes as applied to judicial election ads in a declaratory judgement action filed by the Chamber. *See* Pet. at 5. The Chamber filed the action in federal court seeking an order that the Chamber's judicial candidate commercials were "issue ads" and that any construction of the statutory election reporting requirements which required disclosure by the Chamber would be unconstitutional.[2] *See* Pet. App. at 10a. The

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[2]Mississippi Code requires entities making "independent expenditures" in excess of $200.00 to attest that such expenditures were not coordinated with a candidate and disclose

State argued, and the federal district court found, that the statutes were constitutional as applied to the Chamber's judicial candidate commercials as such commercials were "candidate ads" containing "explicit directives to vote for the named candidate" and were, therefore, subject to the statutory disclosure requirements. *See* Pet. App. at 34a.

In contrast, the *Vollor* court addressed the appropriateness of temporary injunctions and did not review the constitutionality of state election disclosure statutes. The *Vollor* court merely cited the *Moore* decision for the proposition that the ads were subject to campaign reporting requirements. *See* Pet. at 5, 11.

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the persons financing such expenditures. Miss Code Ann. § 23-15-801(j) defines "independent expenditures" as expenditures "expressly advocating the election or defeat of a clearly identified candidate...." This standard was adapted from federal election statutes and this Court's jurisprudence regarding the same.

The petition's lengthy arguments concerning "express advocacy" and the application of the *Buckley* decision are unrelated to the issues decided in *Vollor* and instead directed as a challenge to the findings of the federal district court in *Moore*. *See* Pet. at 15-21. The Chamber's attempt to seek review of the *Moore* decision through drafting an overly expansive petition in the *Vollor* matter is improper. *See* S. Ct. R. 12(4); Stern, *supra*, at 328. The petition should be denied to the extent it seeks review of the *Moore* decision pending before the Fifth Circuit Court of Appeals.

B. Certiorari Should Be Denied As To *Moore* As *Moore* Is Pending Before The Court Of Appeals For The Fifth Circuit.

Even should the *Moore* case be deemed to be properly included in the *Vollor* petition, *Moore* is pending before the Fifth Circuit and no exceptional necessity exists sufficient to justify by-passing the court of appeals in favor of immediate review by this Court. *See* S. Ct. R. 11.

Certiorari to a United States court of appeals before a judgment is entered by that court is, with good reason, "an extremely rare occurrence." *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J.); *see also* Stern, *supra*, at 42, 199-200. While such a review is permissible under extraordinary circumstances, the petition fails to recognize or address the criterion for such review set forth in S. Ct. R. 11. As there is no "imperative public importance" sufficient to warrant "immediate" action by the Supreme Court and the accompanying "deviation from normal appellate practice," review by this Court of the *Moore* decision is unwarranted at this still preliminary appellate stage. *See* S. Ct. R. 11; *see also* Stern, *supra*, at 199 ("The public interest in a speedy determination must be exceptional, however, to warrant skipping the court of appeals in this fashion.")

The State believes that the unique factual and substantive legal issues set forth in the *Moore* decision will benefit from the

reflective study of the Fifth Circuit Court of Appeals and that such an important appellate step should not be foregone on the basis of the arguments now improperly raised in the petition.[3] The federal district court in *Moore* undertook a detailed examination of First Amendment jurisprudence, including analysis of the decisions of this Court in *Buckley v. Valeo* and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), and the application of such decisions by federal and state courts. *See generally* Pet. App. at 9a. The Fifth Circuit Court of Appeals has never addressed the issues presented by

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[3]Review by the court of appeals will sharpen the issues and correct misstatements contained in the petition. For instance, the petition states that the district court found that the Chamber's candidate advertisements contained "no words of 'express advocacy.'" *See* Pet. at 15. However, the district court found that the "advertisements at issue provide explicit directives to vote for the named candidate" as the advertisements mirrored the advertisements run by the candidates themselves. *See* Pet. App. at 34a. The only material difference between the Chamber's ads and the candidates' ads (all of which repeated the candidates' names in connection with campaign slogans) was that the Chamber deleted the words "vote for" in its version of the ads. *See* Pet. App. at 14a-18a.

Moore and experience argues that the Fifth Circuit will clarify and refine the issues to be presented to this Court.

In addition to the benefits to be gained by following traditional appellate procedures, the *Moore* case does not present the need for extremely rapid review sufficient to warrant foregoing the court of appeals. As opposed to the *Vollor* state court case regarding temporary injunctions issued but stayed before elections, the *Moore* case addressed reporting requirements which can be reviewed through normal appellate procedures. The Chamber cannot be heard to argue that it fears immanent and irreparable harm from *Moore* as the Chamber did not ask the Fifth Circuit for a stay of the *Moore* decision pending appeal and the Chamber even requested an extension of the briefing schedule before the court of appeals. If the *Moore* case is truly in need of exceptionally quick review, this Court has previously intrusted appellate courts to act upon cases

with sufficient diligence as to allow for meaningful subsequent review. *See Aaron v. Cooper*, 357 U.S. 566, 567 (1958).

Finally, and a point conceded by the organization of the petition itself, because the issues presented in the *Vollor* and *Moore* decisions are separate and distinct, should this Court feel compelled to take swift and potentially summary action with respect to the now stayed and ineffectual *Vollor* temporary injunctions, the State respectfully submits that the cases and issues should be severed and *Moore* should remain with the Fifth Circuit. *Cf.* Pet. at 12-15 (discussing *Vollor*) *and* Pet. at 15-21 (discussing *Moore*). The *Vollor* state court injunction issues are not present in the *Moore* decision and a review of the propriety of such prior restraints does not require review of the "express advocacy" doctrine and the application of *Buckley* to state election law statutes. There exists no exceptional need sufficient to prematurely wrest the *Moore* case from the Fifth Circuit.

CONCLUSION

The State respectfully requests that the portion of the Chamber's petition for a writ of certiorari which seeks review of the *Moore* decision, specifically the second question presented, should be denied.

March, 2001.

Respectfully submitted,

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No. 00-1255

In The

Supreme Court of the United States

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,

Petitioner,

v.

HON. FRANK G. VOLLOR,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Mississippi

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTIONS PRESENTED

1. Where the only decision of the state supreme court in the case is a brief denial of a stay of a temporary restraining order that does not address the merits of the TRO, and where the questions presented by the petitioner in this Court go not to the propriety of denying the stay but to the underlying merits of the TRO, is there a "final judgment[]" on the merits of the TRO sufficient to give this Court jurisdiction to grant the petition under 28 U.S.C. § 1257?

2. Given that the TRO expired by its own terms after ten days and was stayed by a Justice of this Court on the third day, given that the election to which it related has come and gone, given that the candidate supported by the petitioner was victorious and will not be campaigning for re-election for another eight years, given that the respondent will not be running for election any time soon, given that the possibility of a future injunction against the petitioner is quite speculative, and given that the claims of the petitioner will be timely resolved in the lower courts, is this case moot?

(Assuming jurisdiction to address the merits of the TRO, the petition also raises the following questions:)

3. Are corporate television advertisements clearly designed to persuade voters to cast ballots for a particular state supreme court candidate, aired in the three weeks prior to the election, immune from state campaign finance laws simply because they do not tell the voters in exact words to "vote for" or "elect" the candidate?

4. In the event the advertisements are subject to state campaign finance laws and in the event the substantial expenditures on them violate state law, was a TRO permissible in the context of the unusual circumstances and timing in this case?

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No. 00-1255

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Petitioner,

v.

HON. FRANK G. VOLLOR,
Respondent.

On Petition for
Writ of Certiorari to the
Supreme Court of Mississippi

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

As directed by the Court, the respondent, Hon. Frank G. Vollor, submits this response to the petition for writ of certiorari and urges that the petition be denied.

STATEMENT OF THE CASE

This case grows out of a highly unlikely set of events forged, because of unusual circumstances, in a compressed time frame. It comes to this Court with no evidentiary record save the uncontested factual allegations in affidavits from the respondent and his attorney. There is no final judgment from

the appellate court below on the merits of the temporary restraining order being challenged, and there is no written opinion from that court save a brief order denying the motion for stay.

The Chamber of Commerce (the petitioner here), an incorporated entity, began running frequent television advertisements in favor of certain Mississippi Supreme Court candidates, including incumbent Justice Jim Smith, on October 17, 2000, three weeks before the election. Six days later, the Chamber filed its declaratory judgment action against the State of Mississippi and certain state officials in the United States District Court for the Southern District of Mississippi. After an expedited hearing requested by the Chamber, that Court's decision (described more fully in the Chamber's petition for certiorari) was issued on Thursday, November 2, five days before the election. In that decision, the federal court held that the Chamber's advertisements were not immune on First Amendment grounds from Mississippi's campaign finance laws.

Given a definitive federal court ruling that the Chamber was not immune from those statutes, the Hon. Frank Vollor, who is the respondent here and who was Justice Smith's opponent, sought the next day an injunction in the Chancery Court of Hinds County, Mississippi, to prohibit the Chamber from running further advertisements in violation of Mississippi law.[1]

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[1] Judge Vollor is a Circuit Court judge in Mississippi's Ninth Judicial Circuit, which encompasses Warren, Sharkey, and Issaquena Counties. He has served in that position for over twelve years. The Circuit Court is Mississippi's trial level court of record in matters of law, as distinguished from the Chancery Court, which is the trial level court of record in matters of equity.

Faced with an uncontroverted allegation that the Chamber had purchased advertising in amounts far exceeding the corporate amounts permitted under Mississippi law, see petition for certiorari (pet. cert.) at 6 n.3 and Miss. Code Ann. § 97-13-15, and far exceeding those permitted in judicial elections under Mississippi law, *id.* 23-15-1021, and faced with the fact that Judge Vollor would be irreparably harmed if this massive illegal advertising were to continue in the two weekend days and one business day remaining before the election, the Chancery Court issued the temporary restraining order. Appendix to the petition for certiorari (pet. app.) 4a. The Chamber filed that same day in the Missisippi Supreme Court a petition for permissive interlocutory appeal under Rule 5, Miss. R. App. Proc., or alternatively for a writ of prohibition or mandamus under Rule 21, M.R.A.P., and simultaneously filed a motion for stay of the Chancery Court order. Appendix to this opposition (op. cert. app. 1a); pet. app. 49a. The Mississippi Supreme Court denied the motion for stay later that afternoon. *Id.* 1a. It is from that order that the Chamber has filed the present petition for certiorari. The Chamber's petition for interlocutory appeal remains pending in the Mississippi Supreme Court. The TRO was to expire by its own terms ten days after issuance, *id.* 4a, and Justice Scalia stayed it on Monday, November 6. *Id.* 5a.

Since that time, the Chamber has appealed the federal district court's decision to the United States Court of Appeals for the Fifth Circuit. *Chamber of Commerce v. Moore*, No. 00-60779 (5th Cir.). After obtaining one extension of time, the Chamber filed its brief in that court and the brief of the State appellees is being filed on April 23. In addition, the Chamber on December 4, 2000, took an appeal on the merits to the Supreme Court of Mississippi in a separate case involving what it calls in its petition for certiorari "TRO # 3." Pet. cert. 9. That injunction was issued by the Chancery Court of Jones County,

Mississippi on November 5, 2001. It is reproduced at pet. app. 60a. It involved an election for a separate seat on the Supreme Court, and like the TRO in the present case, it enjoined the Chamber from running its advertisements in violation of Mississippi law. The appeal is styled *Chamber of Commerce v. Landrum*, No. 2000-CA-2048 (Miss.). The record has been completed and the briefing schedule was issued on March 21, 2001, with the Chamber's brief due 40 days thereafter.

REASONS TO DENY THE WRIT

This case comes to this Court on a negligible record created in the exigencies of the unusual confluence of events that occurred here, with no review in the Supreme Court of Mississippi save for its denial of a stay. Indeed, the record does not even include the transcripts, audio, or video of the advertisements at issue. There is no final judgment in the trial court or on appeal, and the Chamber's petition for interlocutory appeal from the TRO remains pending in the Mississippi Supreme Court. To the extent there is any "final judgment" of the Mississippi Supreme Court giving this Court jurisdiction under 28 U.S.C. § 1257, it is only that Court's decision denying the stay. But the questions presented in the Chamber's petition for certiorari go not to the denial of the stay, but to the merits of the TRO.

In contrast to the present case, the underlying federal court decision which sparked these events, and upon the reasoning of which rests the state court TRO, is now pending in the Fifth Circuit upon a final judgment and a full record, including the advertisements in question. In addition, as just noted, the injunction similar to this one in the case of *Chamber of Commerce v. Landrum* (the so-called TRO #3) is pending

before the Mississippi Supreme Court on the merits.[2] It is far better for these questions to be first resolved in those courts by full review with written opinions, and if necessary, upon certiorari to this Court in those cases, than in the hurried circumstances of this case.[3]

In its petition here, the Chamber asserts that it "expects to engage in similar speech during future elections in Mississippi," pet. cert. 2, although it does not specify the elections in which it expects to run advertisements. Justice Jim Smith, the candidate in whose favor the Chamber ran the advertisements at issue here, was elected to a full term, and therefore will not be up for re-election for another eight years. Miss. Code Ann. 23-15-991. There are no scheduled state elections in Mississippi until the fall of 2002, when one of the additional seats on the Mississippi Supreme Court is up for election. Miss. Code Ann. §§ 9-3-1, 23-15-991, 23-15-993. That allows ample time for the Fifth Circuit in the federal case and the Mississippi Supreme Court in the *Landrum* case to resolve these issues with written opinions, and for the Chamber, if necessary, to seek review in this Court. Moreover, the Chamber can seek to expedite any of those proceedings if it believes time is of the essence.

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[2]On March 2, 2001, that Court denied the motion of the appellee in that case, Hon. Billy Joe Landrum, a losing candidate for one of the other Supreme Court seats, to dismiss the Chamber's appeal. Thus, the briefing is going forward and it appears the Court will decide, on the merits, the propriety of the injunction. Apparently, the Court is holding the petition for interlocutory appeal in the present case in abeyance until it resolves the merits in *Landrum*.

[3]There also are other cases that provide better vehicles than this one. For example, as noted in the brief of *amici curiae* Alliance for Democracy and Common Cause/Ohio, the existing situation in Ohio presents the express advocacy issue -- the second issue here -- more squarely than both the present case and the federal case now pending in the Fifth Circuit.

I. BECAUSE ANY FINAL JUDGMENT IN THE MISSISSIPPI SUPREME COURT GOES ONLY TO THE QUESTION OF A STAY AND NOT TO THE MERITS OF THE TEMPORARY RESTRAINING ORDER, AND BECAUSE THE CHAMBER'S PETITION SEEKS REVIEW ONLY OF THE MERITS, THERE IS NO "FINAL JUDGEMENT" ON THE MERITS GIVING THIS COURT JURISDICTION UNDER 28 U.S.C. § 1257 TO GRANT THE PETITION.

The Mississippi Supreme Court's action in the present case is not a "[f]inal judgment[] or decree[]" sufficient to confer jurisdiction on this Court under 28 U.S.C. § 1257, and it certainly is not a "final judgment" with respect to the merits of the TRO, which is what the Chamber is asking this Court to review. At present, the case is before this Court solely on the state supreme court's denial of a stay of a temporary and preliminary injunction. The merits of the injunction itself were not addressed by the Mississippi Supreme Court. There has been no further ruling from the Mississippi Supreme Court concerning the propriety of injunctive relief in this context, either on state or federal grounds. Justice Scalia has granted the stay that the Mississippi Supreme Court denied. Any request for further relief from this Court by way of certiorari is premature.

The Chamber's petition for interlocutory appeal, op. cert. app. 1a, remains pending in the Mississippi Supreme Court, where it apparently is being held in abeyance until that Court rules on the merits in *Landrum*. The Chamber's merits appeal in *Landrum* and its interlocutory appeal in the present case raise not simply the question of whether preliminary injunctive relief of this type should be stayed, but whether, on the merits, it is valid at all. Only after a ruling in *Landrum*, or in response to

the state court petition for interlocutory appeal in this case, will there be a final judgment of the Mississippi Supreme Court on the validity of an injunction in this unique election-eve context.

On selected occasions in the past, this Court has granted certiorari and reviewed the merits of state court injunctions, but has done so in situations where the propriety of the injunction already has been adjudicated on the merits by the state appellate courts. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 544-545 & n.2 (1976), *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 417-418 & n. (1971), *Construction Laborers v. Curry*, 371 U.S. 542, 545-546 (1963). Even in those situations, the Court has said the matter of jurisdiction is difficult. For example, in *Keefe*, where the temporary injunction had been in effect for over three years and had been affirmed on the merits by the state appellate courts, this Court said the finality question was "not entirely free from doubt." 402 U.S. at 418 n.

But in cases where the state appellate courts have done nothing more than deny stays, this Court has limited itself to deciding whether a stay should issue to stop an ongoing injunction. In *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977), this Court -- acting on an application for stay submitted to Justice Stevens and referred to the full Court -- did *not* review the *merits* of the ongoing injunction. It simply held that the state supreme court's *denial of a stay* was a "final judgment"under § 1257. The Court reversed the denial of the stay, which had the effect of staying the injunction. The case was remanded to the state supreme court, which later reversed the injunction on the merits. *Village of Skokie v. National Socialist Party*, 373 N.E.2d 21 (Ill. 1978). But this Court never said that there was a "final judgment" with respect to the merits of the injunction.

Similarly, in *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327 (1975) (Blackmun, J., in chambers), Justice Blackmun held only that there was a final judgment regarding the state supreme court's failure to stay the ongoing injunction, never stating that there was a final judgment on the merits. 423 U.S. at 1329-1330. While granting the stay, he made clear the Court's preference that the matter "should be decided in the first instance by the Supreme Court of Nebraska." 423 U.S. at 1328. This Court later reviewed the merits of the injunction, but only after the state supreme court had done so (subsequent to Justice Blackmun's stay) and had affirmed the injunction (as modified) on the merits. *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 544.[4]

These few cases in which the Court has taken action on temporary state court injunctions stand for the proposition that, at most, the Court has jurisdiction to review the merits of the injunction under § 1257 only if there is a "final judgment" of the state appellate courts disposing of the merits. Where the only action taken by the state appellate courts is to deny a stay, any jurisdiction of this Court under § 1257 is limited to reviewing that denial and issuing a stay of an ongoing injunction if appropriate. That is what Justice Scalia did here when the TRO was in operation. Any post-stay adjudication of the merits must first occur, as both in *Skokie* and *Nebraska Press Ass'n*, in the state appellate courts.

Thus, to the extent there is a "final judgment" of the Mississippi Supreme Court here, it does not go to the merits of the TRO. The only question raised for this Court by that

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[4]Of course, in deciding whether to grant the stay, Justice Blackum examined the First Amendment questions. But he did so only to determine whether a stay should issue, and he did not purport to review the merits of the state supreme court's decision. The same is true for this Court's decision in *Skokie*.

judgment is whether the Mississippi Supreme Court should have issued a stay. But the questions presented by the Chamber's petition for certiorari go solely to the merits. Accordingly, this Court does not have jurisdiction under § 1257 to grant the Chamber's petition, and it must be denied.[5]

II. THIS CASE IS MOOT.

Given the stay and expiration of the TRO, the passing of the election, and the victory by Justice Smith, who was the candidate supported by the Chamber, this case is moot. The Chamber's claim that it "expects to engage in similar speech" in unspecified future elections, and that it will therefore encounter an injunction like the one here, is "wholly conjectural." *Golden v. Zwicker*, 394 U.S. 103, 109 (1969). *See also, Oil Workers Unions v. Missouri*, 361 U.S. 363, 368-369, 371 (1960) (where an allegedly unconstitutional injunction against a labor strike had expired by its own terms, the case was moot despite the possibility of future injunctions against the labor unions that were involved). Justice Smith will not be running for re-election for another eight years, and Judge Vollor will not be seeking an injunction any time soon.[6] The Mississippi courts, aware of Justice Scalia's stay, will be

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[5]Of course, had the Chamber raised the propriety of the denial of the stay in its petition, it would make little sense for this Court to grant certiorari. Justice Scalia already has issued a stay, and there is no need for the members of this Court to hold a referendum on that action.

[6]Even if inclined to run again, Judge Vollor will not be eligible as a candidate for the Supreme Court until 2004 at the earliest. Mississippi's nine-member court is elected by staggered eight-year terms from three separate geographic districts in the state, with each district electing three justices. None of the three seats in Judge Vollor's district will be up for election prior to 2004. *See,* Miss. Code Ann. §§ 9-3-1, 23-15-991, 23-15-993.

unlikely to grant similar TROs in the future, and if they do, the Mississippi Supreme Court will entertain any motions for stay with an awareness of Justice Scalia's action here.[7] As a practical matter, there is "no reasonable expectation that the same complaining party [will] be subjected to the same action again," *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), and certainly not at the hands of the respondent here. *Compare, Norman v. Reed*, 502 U.S. 279, 288 (1992) ("There would be every reason to expect *the same parties* to generate a similar, future controversy subject to identical time constraints if we should fail to resolve the constitutional issues that arose in 1990.") (emphasis added).

And even if the unusual scenario here is capable of repetition, it will not evade review. The similar injunction involving the Chamber is pending on the merits before the Mississippi Supreme Court in the *Landrum* case, and the underlying First Amendment question of whether these advertisements constitute express advocacy or issue advocacy is pending before the Fifth Circuit. The Chamber's petition for interlocutory appeal in the present case, op. cert. app. 1a, remains pending in the Mississippi Supreme Court, apparently

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[7]The Chamber refers to another TRO issued later in the morning of November 6 after Justice Scalia issued his stay earlier that morning in this case. Pet. cert. 10-11. While unfortunate, there is nothing to suggest this will be repeated in the future, or that the Mississippi Supreme Court would not have stayed that TRO itself (in light of Justice Scalia's stay) had it been asked. (In the interest of time, the Chamber simply supplemented its stay application to Justice Scalia rather than asking the Mississippi Supreme Court to stay the later TRO). At least one other Mississippi chancery judge, when asked to enjoin the Chamber advertisements after Justice Scalia's stay, refused to do so. *Diaz v. Chamber of Commerce*, No. C2402-00-0106 (Chancery Ct., Harrison Cty., Miss., Nov. 6, 2000) (denying motion for preliminary injunction). Thus, despite the Chamber's contrary suggestion, there is not much of a chance that history will be repeated here.

being held in abeyance until *Landrum* is decided. Thus, the questions presented by the Chamber likely will be decided in the lower courts in a timely manner without the need for further intervention by this Court at this time.

III. EVEN IF THIS COURT HAS JURISDICTION TO GRANT THE PETITION IN THIS CASE AND REVIEW THE MERITS OF THE TEMPORARY RESTRAINING ORDER, IT SHOULD DECLINE TO DO SO.

Even if this Court has jurisdiction, it should decline the Chamber's invitation to take this case and instead should reserve these issues for a different case on a better record. The Chamber claims that the world cannot wait, that these injunctions are part of "a growing and disturbing practice," *id.* 12, and that absent swift action from this Court, future election advertising will be subject to a "proliferation of . . . prior restraints." Pet. cert. 11. But despite these alarms, there is no brush fire of injunctions sweeping the nation. Indeed, in its canvass of the law, the Chamber has uncovered only two injunctions outside of the recent Mississippi election, one from 1994 and one from 1996. *Id.* 11, 14. Of course, the TROs from the Mississippi election were triggered by the federal district court's expedited ruling in the Chamber's own declaratory judgment action, all coming shortly before the election of four seats to the Mississippi Supreme Court. This unusual timing and chain of events is unlikely to repeat itself.

With respect to the underlying issue raised in that federal case, the Chamber contends that action from this Court is required because any future ruling in its favor by the Fifth Circuit will not bind the Mississippi courts. Pet. cert. 20-21 n.13. But the entire state court process in this case was occasioned by the federal district court's ruling that the

Chamber's advertisements were not immune from Mississippi campaign finance laws on First Amendment grounds. The Chancery Court specifically relied on the federal ruling in issuing the TRO in this case. Pet. app. 4a. Having relied upon the federal district court's ruling, it is hard to believe that the Mississippi courts will later turn a blind eye should the Fifth Circuit reverse the district court and hold that these advertisements are immune from state regulation. *See, Burrell v. Mississippi State Tax Comm'n*, 536 So.2d 848, 864 (Miss. 1988) ("When Mississippi courts are enforcing rights created under federal law, the Mississippi courts must follow the interpretations of those rights provided by federal courts.") [8]

At any rate, it is clear that the record of the present case, which does not include the Chamber's advertisements, is not the record upon which the important First Amendment question of express advocacy should be resolved. Neither is it the case in which the prior restraint issue should be resolved. Indeed, if the Court chooses (as we suggest) not to resolve the express advocacy question here, it could only resolve the separate

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[8] Of course, it is the Chamber that chose to pursue its declaratory judgment action in federal court rather than state court. It could have filed such an action in state court and indeed still can. However, there is no need now, particularly given that all of these issues are raised in the Chamber's appeal to the Mississippi Supreme Court in *Landrum*.

The Chamber makes the unfortunate suggestion that Mississippi judges may have been biased in favor of fellow judges who requested the TROs and against the Chamber, which "was from out-of-state and perhaps represented disfavored views." Pet. cert. 13. Of course, the fellow judges who requested the TROs were in election contests against other fellow judges and there is nothing to indicate that the Chancery Judge in this case, for example, was biased in favor of Judge Vollor and against Justice Smith. Furthermore, there is absolutely no basis for the Chamber's suggestion that the Mississippi courts are prejudiced against out-of-state litigants or against the Chamber because of its purported "disfavored views."

question of the validity of the TRO by assuming that the advertisements are express advocacy and are subject to state regulation. While the Chamber indicates that this question is easily answered by speaking in the ominous terms of "prior restraint," the matter is not so simple.

If it is assumed that the federal district court is correct, and if the spending limits in Mississippi law were far exceeded by the Chamber to the detriment of Judge Vollor (a proposition the Chamber has not disputed in this Court), an injunction against further illegal advertisements was the only means by which the election process could be protected. Without an injunction, the candidate whose supporters abide by the law is at a distinct disadvantage to the candidate whose supporters flaunt the law with only the risk of an after-the-fact civil or criminal fine.

Unlike cases where, for example, a determination of prejudice stemming from the pretrial reporting of a defendants' confessions "was of necessity speculative," *Nebraska Press Assocation v. Stuart*, 427 U.S. 539, 563 (1976), or even where a claim of harm from publication of national security documents was subject to question, *New York Times Co. v. United States,* 403 U.S. 713, 726-727 (1971) (Brennan, J., concurring), the illegality here and the ensuing harm are clear. Again, *if* the federal court is correct, a determination of whether the monetary limits have been violated is simply a matter of numbers -- particularly where, as here, the amounts far exceed the law's limits. [9]

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[9]Unlike the types of speculation involved in many prior restraint cases, "relative certainty can ordinarily be obtained in the context of prepublication restraints on the publication of obscene material or commercial advertisements. . . . A court's determination that material is obscene or an advertisement false is thus as plausible before as after the communication's publication." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-36 (2nd Ed. 1988). The same can be said for transgressions, particularly substantial ones, of the monetary limits in campaign finance laws.

Certainly it seems that a state, if it chose, could pass campaign finance laws limiting, say, corporate expenditures for express campaign advocacy, *see, Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 664-665 (1990), and provide that if the monetary limits contained in those laws are exceeded in mid-campaign, and if the violation is proved by clear and convincing evidence, further advertising in violation of the limits could be enjoined. The State could do this, it would seem, to insure that the process is not corrupted by those willing to ignore the law and spend massive amounts of corporate money. And if the First Amendment does not prohibit a state from taking such action, then it cannot be said -- as the Chamber suggests here -- that injunctions against express advocacy are per se unconstitutional. This is a complicated question, as is the question of the circumstances under which a state can rightfully enjoin massive violations of its campaign finance statutes. These matters should not be resolved in the present case, which involves an unlikely factual scenario. And if they are to be resolved in this scenario, they should be addressed first in a case like *Landrum,* where the Mississippi Supreme Court will have an opportunity to fully consider the merits of an injunction like this one and the Chamber's contentions regarding it.[10]

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[10]Indeed, in the present case, in both the trial court and in the pending petition for interlocutory appeal to the Mississippi Supreme Court, op. cert. app. 7a-8a, 11a-13a, the Chamber has contended that the injunctions violate not only the First Amendment, but also are contrary to Mississippi law in a number of respects. Presumably, the Chamber will argue the same thing before the Mississippi Supreme Court in *Landrum.* If the Mississippi Supreme Court agrees with any of the Chamber's state law contentions after full review on the merits, there will be no need to resolve the federal constitutional question.

CONCLUSION

There is no "final judgment or decree" under § 1257 going to the merits of the TRO being challenged by the Chamber, and this case is moot. But even if this Court does have jurisdiction to grant the Chamber's petition, the Court should decline to exercise it for all of the reasons listed in this brief. This case stems from an unusual set of events unlikely to be repeated. The Chamber's federal lawsuit and the eleventh hour federal ruling resulted in hurried state court proceedings that led to a negligible record, no evidentiary hearing, no final judgment, and no opportunity for considered reflection or a written opinion from the state's highest court. This case has not been decided on the merits. The questions it raises should first be resolved elsewhere.

For the foregoing reasons, and on the basis of the authorities cited, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2000-M-1839

IN RE: CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA PETITIONER

PETITION FOR INTERLOCUTORY APPEAL BY PERMISSION OR, IN THE ALTERNATIVE, FOR WRIT OF MANDAMUS OR PROHIBITION

(Filed Nov. 3, 2000)

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. _____

IN RE: CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA PETITIONER

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made for the Justices of this Court to evaluate possible disqualifications or recusal.

1. United States Chamber of Commerce, defendant-appellant.

2. Michael B. Wallace, Christopher R. Green and Phelps Dunbar, L.L.P., attorneys for appellant United States Chamber of Commerce.

3. Circuit Judge Frank G. Vollor, plaintiff-appellee.

4. Paul Kelly Loyacono, Vicksburg, Mississippi, attorney plaintiff-appellee Frank G. Vollor.

5. Because this matter concerns advertisements concerning candidates for election to this Court, it is possible that certain Justices may consider themselves interested even though not a party to this action.

/s/ Michael B. Wallace
MICHAEL B. WALLACE

INTRODUCTION

The Chancery Court of the First Judicial District of Hinds County has ordered the Chamber of Commerce of the United States of America ("U.S. Chamber") and eight local television stations to cease running certain advertisements concerning plaintiff Frank G. Vollor and Justice Jim Smith, both of whom are candidates for election to this Court in the general election scheduled for Tuesday, November 7. This order followed by a day a federal opinion holding that the First Amendment does not shield the U.S. Chamber from reporting requirements under Mississippi state law regarding four of those advertisements. *See Chamber of Commerce v. Moore*, No. 3:00-CV-778WS (S.D.Miss. Nov. 2, 2000). During that federal litigation, the Attorney General repeatedly and explicitly disclaimed any intention of seeking to enjoin the advertisements.

The U.S. Chamber respectfully requests this Court to grant an interlocutory appeal, or, in the alternative, to issue its writ of mandamus or prohibition, so as to vacate the Circuit Court's order. Such an order will "[m]aterially advance the termination of the litigation and avoid exceptional expense to the parties" and will also "protect a party from substantial and irreparable injury." M.R.A.P. 5(a)(1) and (2).

FACTS NECESSARY TO AN UNDERSTANDING OF THE ISSUES

This fall, the U.S. Chamber has independently sponsored a series of television advertisements concerning candidates for judicial office in several states. As a part of

that effort, on October 17, 2000, the U.S. Chamber began airing television advertisements in Mississippi to inform the public about the experience of certain candidates for the Mississippi Supreme Court regarding particular issues of public importance, such as the administration of criminal law.

The Attorney general and Secretary of State believed that these expenditures subjected the U.S. Chamber to the reporting requirements of Miss. Code Ann. § 23-15-801 *et seq*. The U.S. Chamber disagreed and filed suit in federal court seeking a declaration that four of the advertisements were not "express advocacy" under *Buckley v. Valeo*, 424 U.S. 1 (1976), and therefore were not subject to state regulation. Following an expedited hearing, Judge Wingate of the Southern District of Mississippi disagreed. He held that the four advertisements at issue were express advocacy, and so were outside *Buckley's* protections from state regulation. *See Chamber of Commerce v. Moore, supra*, memorandum opinion at 27.

On November 3, Judge Frank G. Vollor obtained the present temporary restraining order forbidding the broadcast of the U.S. Chamber's advertisements concerning him or his opponent, Justice Jim Smith. His application to the Chancellor is attached as Exhibit A. The Chancellor's temporary restraining order is attached as Exhibit B. The U.S. Chamber's petition for permission for interlocutory appeal and stay pending appeal is attached as Exhibit C. Judge Singletary has left for the weekend without ruling on that petition.

STATEMENT OF ISSUES AND RELIEF REQUESTED

Petitioner seeks certification on interlocutory appeal, pursuant to M.R.A.P. 5, regarding the following issues: Whether Judge Vollor has proven a violation of Mississippi's campaign laws, and, if so, whether such proof can support, consistent with the First Amendment of the federal Constitution, an injunction against political speech. Alternatively, the U.S. Chamber seeks a writ of prohibition or mandamus pursuant to M.R.A.P. 21 instructing the Chancery Court to vacate its TRO.

REASONS FOR GRANTING RELIEF

1. The TRO is an improper prior restraint on First Amendment rights.

In the leading case, the United States Supreme Court refused to condone an injunction against *The New York Times'* publication of the so-called "Pentagon Papers," even though the documents had apparently been obtained illegally and their publication threatened national security. The Court held: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. The Government thus carries a heavy burden of showing justification for the imposition of such a restraint." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (citations and quotation marks omitted). Similarly, in *Near v. Minnesota*, 283 U.S. 697, 702, 722-23 (1931), the Supreme Court struck down a statute that permitted injunctive relief against "malicious" or "defamatory" newspaper articles, and in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 541, 570 (1976), the Supreme Court held that

a restraint against news media reports on a criminal defendant's confessions or admissions failed to meet the heavy burden of presumption against prior restraints.

More recently, the Fifth Circuit refused to allow restrictions on speech between litigants and potential members of a class, reasoning: "Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss – a loss in the immediacy, the impact, of speech." *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 469 (5th Cir. 1980) (en banc) (citations and quotations omitted). The court explained "[t]he justification for drawing a distinction based on th[e] difference [between prior restraint and post publication enforcement] is that a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Id.* at 468. The effect of enjoining speech, instead of seeking to punish the alleged improper activity through proceedings which safeguard an accused's rights and defenses, is clear:

> "[A] prior restraint may be distinguished from a statute prohibiting publication in that the former has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Id.* at 469 (quotation omitted).

See also Jeffries v. Mississippi, 724 So.2d 897 (Miss. 1998) (rejecting prior restraint prohibiting a reporter from publishing information discussed in open court).

A case that is precisely on point is *Republican Party of Florida v. Florida Elections Commission*, 658 So.2d 653 (Fla.

App. 1995). In that case, just weeks prior to an election, the plaintiffs alleged that certain advertisements by the Republican Party of Florida ("RPF") constituted illegal campaign contributions under Florida law, and obtained an injunction from the trial court against the airing of those advertisements. *Id.* at 654-55. In no uncertain terms the Court of Appeal reversed the injunction, holding that the injunction was an improper prior restraint of the RPF's First Amendment rights, even if the advertisements constituted illegal contributions. *Id.* at 655, 657. The Court found that the State's interest in enforcing its election laws is adequately protected through the agency's procedures and not the extraordinary remedy of prior restraint of free speech rights. *Id.* at 657. "[P]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." *Id.* (quotation omitted).

The Florida Court of Appeal reiterated the longstanding view that prior restraint is impermissible, especially if the statutory or regulatory scheme provides a different remedy. In *Near*, the United States Supreme Court traced this precept back to Blackstone's Commentaries, noting that every person has a right, as here, to "lay what sentiments he pleases before the public," and then take the consequences afterwards if he violates the law. 283 U.S. at 714 (quoting 4 Bl. Com. 151, 152).

2. The TRO is not authorized by Mississippi law.

The Mississippi Election Code provides ample remedies for violation of the statute. *See* Miss. Code Ann.

§ 23-15-813 (civil penalties); *id.* § 23-15-811 (other sanctions). Implicitly recognizing the prior restraint doctrine, the statute does not grant authority to seek an injunction against violations.

Of the utmost importance is the fact that § 23-15-13 vests initial enforcement authority in the Secretary of State. Neither the Secretary of State nor the Attorney General, who has principal responsibility for enforcement of the State's laws, was joined as a party in the Chancery Court proceedings; although both Secretary Clark and General Moore are parties to the federal proceeding, they have not sought any relief against the Chamber. The detailed remedial scheme provided by the statute makes no allowance for an enforcement action brought by candidate or other private citizen.

Nor is enforcement authorized under general principles of Mississippi equity. "Courts of equity concern themselves only with matters of property and with the maintenance of civil rights, and do not interfere with issues that are purely personal, or political, or with crimes. . . . " V. Griffith, *Mississippi Chancery Practice* § 435 (2d ed. 1950). In light of the political nature of this action, and the criminal penalties provided by § 23-15-811, the Chancery Court had no power under Mississippi law to enjoin the broadcast of these advertisements.

CONCLUSION

This Court should summarily vacate the Chancellor's order, pursuant to M.R.A.P. 21. Alternatively interlocutory appeal should be granted and the matter set for briefing and argument, pursuant to M.R.A.P. 5.

Respectfully submitted,

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA

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IN THE CHANCERY COURT OF THE
FIRST JUDICIAL DISTRICT

OF HINDS COUNTY, MISSISSIPPI

FRANK G. VOLLOR — PLAINTIFF

VS. — NO. G2000-2128 S/2

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WABG-TV, GREENVILLE, MS; WXVT-TV, GREENVILLE, MS; WAPT-TV, JACKSON, MS; WJTV-TV, JACKSON, MS; WLBT-TV, JACKSON, MS; WDBD-TV, JACKSON, MS; WTOK-TV, MERIDIAN, MS; AND WCBI-TV, COLUMBUS, MS — DEFENDANTS

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TRANSCRIPT OF PROCEEDINGS HELD IN THE ABOVE STYLED AND NUMBERED CAUSE BEFORE **THE HONORABLE WILLIAM H. SINGLETARY**, CHANCELLOR, ON THE 3RD DAY OF NOVEMBER, 2000.

****

APPEARANCES:

Present and Representing the Plaintiff:

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* * *

[16] [MR. WALLACE] Nevertheless, Your Honor, they have come to this Court asking to enjoin the broadcast of these advertisements. In addition to their failure to establish personal jurisdiction over the Chamber, they have failed to allege or establish the jurisdiction of this Court. There is not a single allegation anywhere in this application that suggests why the chancery court has jurisdiction over this matter. Indeed, it is not even clear – as a matter of fact, it is clear to the contrary that no action is pending before this Court. As the Court knows, Rule 3 says that an action commences with the filing of a complaint, and Rule 65, 65(b), on TRO presupposes a complaint, because it says you may proceed on your verified complaint. No complaint has been served on me. We have simply an application for a TRO in an action which has not been commenced in a court, the jurisdiction of which has not been established. They suggest that this court is entitled to enjoin these advertisements, presumably on the theory that they are illegal.

[17] Your Honor, under any theory of illegality, the statute itself sets up an enforcement scheme. The enforcement scheme for the reporting statutes and independent expenditure is a criminal enforcement scheme. Under Section 23-15-811(a), "Any candidate or any other person who shall willfully and deliberately . . . violate the provisions and prohibitions of this article shall be guilty of a misdemeanor. . . . " Now, again, they've not explained how we have violated the article. But if we have, we have committed a crime. Now, I've not been able to get in the library, but I did pick up my Griffith's on the way over here. And Section 435 of the second edition of Griffith

states, "The courts of equity concern themselves only with matters of property and with the maintenance of civil rights and do not interfere with issues that are purely personal or political or with crimes." Now, this case falls in at least two of those categories, Your Honor. It is political and, according to the allegations of the application, it is criminal. This Court has no jurisdiction whatsoever to enjoin the commission of a crime and no TRO may enter here on these allegations.

Indeed, this statutory scheme puts full enforcement power in the hands of the attorney general and the secretary of state. There is no provision whatsoever for enforcement of the statute [18] by private attorney general. The most that may be possibly available in the way of private enforcement is further down in Section 23-15-811. It says, in addition to the criminal penalties, anyone who fails to file a report "may be compelled to file such statement or report by an action in the nature of a mandamus." If we have failed to follow the reporting statutes, which we deny, Your Honor, the remedy is for a mandamus to be brought against us. Because this is a public statute, the attorney general would have to file that mandamus. I imagine the Court is familiar with the cases that suggest when you call on the attorney general to bring a mandamus and he does not do so, in some circumstances the private party may bring a mandamus. None of that is done here. To the extent that there can be any remedy under the statutory scheme for private parties, that remedy can only be a mandamus after the attorney general has failed to file it, and the mandamus goes only to the report. It does not take the ads off the air.

There is one other item. In addition to the fact this Court has no jurisdiction, no authority to issue an injunction, this matter remains within the – fully within the jurisdiction of another court. Judge Wingate has issued an opinion. He has not issued a judgment as of half an hour ago when I called over there. The matter [19] is still before Judge Wingate. The State of Mississippi is represented in that action by its attorney general and its secretary of state, the officers who are given authority to enforce this statute. To the extent Judge Vollor claims to have authority to enforce the statute as a private attorney general, he is clearly in privity with the public attorney general, who is presently litigating this matter. And this matter, then, should be dismissed or abated as long as jurisdiction over this whole dispute is in another court. And if Judge Vollor believes that the attorney general is not properly representing him and he wants to appear as a private attorney general, the case is still pending, and he's welcome to go over there and file his motion to intervene and his application for relief over there. That's where he ought to be.

* * *

MOTION FILED
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No. 00-1255

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Petitioner,

v.

HON. FRANK G. VOLLOR,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

MOTION FOR LEAVE TO FILE AND *AMICI CURIAE* BRIEF OF ALLIANCE FOR DEMOCRACY AND COMMON CAUSE/OHIO RESPECTING CERTIORARI

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MOTION FOR LEAVE TO FILE *AMICI* BRIEF RESPECTING CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, Alliance for Democracy and Common Cause/Ohio hereby submit this motion for leave to file the accompanying *amici curiae* brief addressing whether this Court should grant review of the two questions presented in the petition in this case.

The accompanying brief comports with the text and purpose of Rule 37 in that it "brings to the attention of the Court relevant matter not already brought to its attention by the parties." Specifically, the accompanying brief provides the Court with relevant information concerning an Ohio case that raises the same issue as the second question presented in the petition. Indeed, petitioner here (the Chamber of Commerce of the U.S.) is a party to the Ohio case as well, and the petition itself (at 19) refers to this Ohio case, albeit without detail. The Alliance for Democracy and Common Cause/Ohio are parties adverse to petitioner in the Ohio case and provide, in the accompanying *amici* brief, additional information about the Ohio case that may aid the Court in its consideration of the instant petition.

Because this Court has granted respondent until April 23 to file a response to the petition (and specifically requested respondent to do so), this motion and the accompanying brief are timely under Rule 37.2(a).

Respondent has consented to the filing of the accompanying brief, but petitioner has withheld consent.

For the reasons described above, the *amici* as movants here have a direct stake in the Court's disposition of the instant petition, since a grant of certiorari and decision on the merits concerning the second question presented in the petition would have a direct bearing on the Ohio case in which both the petitioner and the *amici* are parties.

Accordingly, this Court should grant this motion for leave to file the accompanying *amici curiae* brief.

Respectfully submitted,

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AMICI CURIAE BRIEF RESPECTING CERTIORARI

INTEREST OF *AMICI CURIAE*

Alliance for Democracy is a national organization, based in Boston, devoted to improving the democratic process throughout the United States. Common Cause/Ohio is the local chapter of a similar national organization, one which frequently appears before this Court as *amicus curiae* in cases concerning issues of campaign finance. Of particular relevance here is the participation of the two *amici* in administrative and judicial proceedings in an Ohio case similar to this one. The petition here (at page 19) refers specifically to this Ohio case, and a primary purpose of this *amici* brief is to provide this Court with additional information concerning the Ohio case, in order to aid the Court in its disposition of the petition.

Respondent has consented to the filing of this *amici* brief, but petitioner has not.*

ARGUMENT

In considering the petition, the Court should distinguish sharply between the two questions presented. The first question presented, concerning the validity of the temporary injunction already stayed by this Court (per Justice Scalia, in chambers), raises a question concerning the "prior restraint" doctrine. This Court should either deny review of the validity of this prior restraint, as respondent urges in his brief in opposition, or else summarily vacate the injunction on the ground that the record here does not disclose sufficient evidence to overcome the generally strong presumption against prior restraints under the First Amendment. *New York*

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* This brief was wholly authored by counsel for *amici curiae* listed on its cover, and no person or entity, other than the *amici curiae*, their members or their counsel, made a monetary contribution to the preparation or submission of this brief.

Times v. United States, 403 U.S. 713 (1971). In no event, however, should the validity of this prior restraint be set for argument, since the absence of a well-developed record concerning facts that might be relevant to the validity of the prior restraint (for example, whether respondent lacked an opportunity for counter-speech in the last few days before the election) makes this question unsuitable for such plenary review on this record.

The second question presented, by contrast, raises an important and unresolved issue of law concerning the meaning of "express electoral advocacy" under *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986). Although this question undoubtedly is worthy of this Court's plenary consideration in the abstract, it is not properly presented in the current posture of this case.

1. The petition's second question is not properly presented for one basic reason: if this Court were to determine that the prior restraint in this case is unconstitutional, anything that the Court might say regarding the meaning of "express electoral advocacy" under *Buckley* and *MCFL* would be pure dicta. This is true because, as is well-settled under the prior restraint doctrine, "a prior restraint may be struck down even though the particular expression involved could be validly restricted through subsequent criminal punishment or civil liability." Kathleen Sullivan & Gerald Gunther, *First Amendment Law* 335 (1999); see also *New York Times v. United States*, 403 U.S. at 733 (1971) (White, J., concurring) ("[F]ailure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal punishment.").

Applying this well-settled principle to the case at hand, it is altogether possible that the State of Mississippi has the authority to impose upon the Chamber of Commerce subsequent punishment or liability for failing to make

disclosures concerning the TV ads in dispute, on the ground that these ads are properly characterized as "express electoral advocacy" under *Buckley* and *MCFL*, even assuming the injunctions issued against the broadcasting of these ads were unconstitutional prior restraints. But only these injunctions are currently before the Court in this case: the judgment of the Mississippi Supreme Court that the petition asks this Court to review simply refused to stay one of these injunctions. Thus, this case does not properly present the question whether the State of Mississippi may impose subsequent punishment or liability for nondisclosure on the ground that the Chamber's ads were "express electoral advocacy."

This Court, moreover, will have ample opportunity to address this *Buckley*-related question in future cases. As the State of Mississippi itself observes in its own *amicus* brief respecting certiorari, this very question is currently pending before the Fifth Circuit in a declaratory judgment action brought by the Chamber itself. Although the mere existence of the Fifth Circuit case would not deprive this Court of jurisdiction here, were the same question properly presented on review of a judgment of the Mississippi Supreme Court, the key point is that this *Buckley*-related question is *not* properly presented on review of the state supreme court's judgment, but only in the Fifth Circuit case. Thus, surely it is appropriate for this Court to wait until it receives a petition to review the Fifth Circuit's judgment in order to address this *Buckley*-related question.

2. In addition, the same *Buckley*-related question is also squarely presented in a case currently pending in Ohio. The Ohio case also concerns ads sponsored by the petitioner here (the Chamber of Commerce of the U.S.) in connection with the election of candidates for seats on the State's supreme court. There were two seats of the seven-member Ohio Supreme Court up for election last November, and these races

were hotly contested, since that court had issued a series of controversial rulings—all by the same 4-to-3 majority—that were regarded by some as adverse to business interests in the State.

Ohio, like Mississippi, requires financial disclosure with respect to ads that qualify as "express electoral advocacy" under *Buckley* and *MCFL*. *See* Ohio Rev. Code 3517.10(G). In addition, Ohio, like Mississippi (and also Michigan), prohibits corporations to engage in such electioneering except through separate accounts funded by individuals and created specifically for that purpose. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); Ohio Rev. Code 3599.03(A). The Chamber aired three ads in Ohio that are alleged to have violated the State's disclosure and separate accounts requirements. (The Ohio case also involves a fourth ad sponsored by an organization apparently affiliated with the Chamber, but disclosure is necessary to determine the extent of their affiliation.)

One of these Ohio ads is an attack on the integrity of the incumbent justice, Alice Resnick, who wrote several of the Ohio Supreme Court's most controversial 4-to-3 decisions, and whom some large corporations in the State wished to defeat at the polls. The ad depicts Justice Resnick changing her vote in response to a letter received from a campaign contributor and specifically accuses her of letting her campaign contributors dictate the outcome of her vote in cases before the court.

The other two Chamber ads in Ohio are comparisons of the qualifications of the two competing candidates for each of the seats on the Ohio Supreme Court that were contested last November. One compares Justice Resnick with her opponent, Judge Terrence O'Donnell of the State's court of appeals. This ad quotes negative newspaper comments about Justice Resnick, compared with positive comments about Judge O'Donnell (as well as a "highly recommended" endorsement

from the Cleveland Bar Association), concluding that there are "big differences" between the two candidates.

Likewise, the third of the Chamber's Ohio ads compares the qualifications of the incumbent Justice Deborah Cook with her opponent, Judge Tim Black. (In contrast to Justice Rensick, Justice Cook is one of the 3-member minority on the court, and thus the corporate interests opposing Justice Resnick supported the reelection of Justice Cook.) This ad described Justice Cook as a well-qualified incumbent who had ruled on many important death penalty cases, while saying of her opponent that he was a municipal court judge who had never ruled on a death penalty case. Again, this comparative ad concluded that there were "big differences" between the two candidates. (The storyboards for the Chamber's three ads in Ohio are contained in an appendix to this brief.)

As in this Mississippi case, the Chamber claims that its Ohio ads are not "express electoral advocacy" under *Buckley* and *MCFL* solely because these do not contain certain specific words like "support" or "vote against." The Ohio Elections Commission has issued a split (4-to-3) decision, agreeing with the Chamber that *Buckley* and *MCFL* prevent the Commission from exercising jurisdiction over the Chamber's ads pursuant to Ohio law. Judicial proceedings to resolve this *Buckley*-related question are now pending in Ohio, and these proceedings eventually will make their way to this Court. (It is unclear at present whether the Ohio case will proceed in state or federal court: both the Commission and Chamber have taken the position that the state judiciary lacks the power to hear an appeal of the Commission's jurisdictional ruling on this *Buckley*-related question, and thus the question may be addressed in a federal-court declaratory judgment action comparable to the one now pending before the Fifth Circuit. Either way, this *Buckley*-related question will end up before this Court in a petition for certiorari from

Ohio that squarely presents the question whether the Chamber's ads are properly classified as "express electoral advocacy.")

Thus, the Ohio case will provide this Court with another opportunity to address the *Buckley*-related issue that is not properly before this Court on review of the instant judgment from the Mississippi Supreme Court. (The Ohio case does not involve the issue of a prior restraint.) Indeed, it might be considered that the Ohio case would present a particularly suitable vehicle for addressing this *Buckley*-related question because, if the kind of comparative ads that the Chamber sponsored in Ohio do not count as "express electoral advocacy," then the test under *Buckley* and *MCFL* truly is a limited set of specific words, as the Chamber contends. To put the point bluntly, an ad that explicitly asserted that "Joe Smith is better qualified to be elected Senator than Mary Jones" undoubtedly would count as express electoral advocacy under *Buckley* and *MCFL*. Consequently, a comparative ad that "in effect" says the exact same thing—by asserting that one candidate is well-qualified while the other is not, and concluding that there are "big differences" between the two candidates—should count as express electoral advocacy under the specific reasoning of *MCFL* (479 U.S. at 249). In any event, the fact that the Chamber of Commerce contends otherwise (and that the Ohio Elections Commission has divided 4-to-3 on this issue) shows just how well-suited this Ohio case is for clarifying the limits of the "express electoral advocacy" standard under *Buckley* and *MCFL*.

Accordingly, the existence of this Ohio case is an additional reason to deny certiorari on the *Buckley*-related question here.

CONCLUSION

Whatever the Court's disposition concerning the first question presented in the petition, the Court should deny certiorari on the second question presented.

Respectfully submitted,

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April 2001

APPENDIX

The Murphy Pintak Gautier Hudome Agency, Inc.

30 Television
Date: October 12, 2000

Client: U.S. Chamber of Commerce
Title: "Complaint"
Spot #:

Video:	Audio:
Over shoulder shot of woman dressed in judicial robes.	Alice Resnick . . .
Bag of money empties onto tables.	She's taken over $750,000 in contributions come from personal injury lawyers—and she rules with them nearly 70 percent of the time.
Lower 1/3 CG: "Resnick: $750,000 from personal injury lawyers. . . . Source: Ohio Campaign Finance Reports Resnick: rules with them nearly 70% of time Source: Ohio Chamber of Commerce Study	
Transition to various shots of woman in robes shuffling papers, marking ballot, pursuing letter, re-marking ballot.	

Video (cont'd):	Audio (cont'd):
Lower ½ CG: Resnick: Took over $20,000 from one contributor. Source: Akron Beacon Journal 10/13/91	She took over $20,000 from one influential contributor. On one important vote she cast after that same contributor sent a letter of complaint— Alice Resnick was the only Supreme Court justice to reverse her own vote.
Closing board: Justice Alice Resnick Voting with Contributors Changing When They Complain Learn more: www.LitigationFairness.org Paid for by U.S. Chamber of Commerce	Justice Alice Resnick—voting with her contributors and even changing her vote after they complain.

The Murphy Pintak Gautier Hudome Agency, Inc.

Type: Issue Advocacy

30 Television
Date: October 28, 2000

Client: U.S. Chamber of Commerce
Title: "Ohio Papers"
Spot #: USCC-1073

Video:	Audio:
Board: Judge Terry O'Donnell Paid for by U.S. Chamber of Commerce	What's being said about Judge Terry O'Donnell:
"Highly recommended"—Cleveland Bar Association	"Highly recommended"
"one of Cleveland's Toughest Judges"—Cleveland Magazine	"one of Cleveland's Toughest Judges"
"thoughtful...and respected" —Plain Dealer	"thoughtful . . . and respected"
"a reputation for integrity and intelligence"—Akron Beacon Journal	"a reputation for integrity and intelligence"
Alice Resnick	And Alice Resnick?
"an unseemly willingness to politicize her office"—Columbus Dispatch	"an unseemly willingness to politicize her office"
"lacks judicial temperament" —Akron Beacon Journal	"lacks judicial temperament"

Video (cont'd):	Audio (cont'd):
"blind to the ethical compromises of taking 78 percent of her contributions from . . . trial lawyers who get wealthy on settlements affirmed by the Supreme Court."—Cincinnati Enquirer Judge Terry O'Donnell "Highly recommended" Cleveland Bar Association Learn more: www.LitigationFairness.org	"blind to the ethical compromises of taking 78 percent of her contributions from . . . trial lawyers who get wealthy on settlements affirmed by the Supreme Court." O'Donnell and Resnick—big differences.

The Murphy Pintak Gautier Hudome Agency, Inc.

30 Television

Date: October 19, 2000

Client: U.S. Chamber of Commerce
Title: "Cook & Black Compare"
Spot #: USCC-1063

Video:	Audio:
	Music Up & Under ANNOUNCER:
Blue Box & Red Box next to each other with points appearing in respective boxes as announcer reads.	Deborah Cook and Tim Black. Compare. Justice Cook is an experienced Ohio Supreme Court Justice. Tim Black is a municipal court judge who's never heard an appeal. On education Deborah Cook has voted to require instructors who are paid actually have to teach. And Justice Cook regularly rules on important death penalty cases. Tim Black has never ruled on a death penalty case but he's ruled on many traffic cases.
Closing board: Deborah Cook & Tim Black Big Differences Learn more: www.LitigationFairness.org Paid for by U.S. Chamber of Commerce	Supreme Court Justice Deborah Cook and Municipal Judge Tim Black. Big differences.

(5)

No. 00-1255

Supreme Court, U.S.
FILED
MAY 3 2001
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Petitioner,

v.

HON. FRANK G. VOLLOR,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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DISCUSSION

Petitioner Chamber of Commerce of the United States of America ("Chamber") hereby replies to the Brief In Opposition To The Petition For Writ Of Certiorari submitted by Respondent Judge Frank G. Vollor. Respondent does not contest that the two issues presented by the Petition merit this Court's attention. Instead, Respondent asserts (at 10-11) that technical obstacles preclude review in this case and, in any event, this Court should wait for "a different case on a better record." To the contrary, the supposed technical obstacles do not exist and this record is fully adequate to decide the two legal issues presented by the Petition.

1. Respondent confirms (at 10 & n.7) that Mississippi courts granted a series of temporary restraining orders ("TROs") that banned Petitioner's political speech during the final days of the 2000 election of justices to the Mississippi Supreme Court.[1] Respondent agrees (at 3) that Petitioner asked the Mississippi Supreme Court to stay TRO #1, and that the stay motion was denied (Pet. App. 1a). This Court,

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[1] On Friday, November 3, 2000, Frank G. Vollor was granted a TRO from the Chancery Court of the First Judicial District of Hinds County, Mississippi ("TRO #1") (Pet. App. 2a). On Saturday, November 4, 2000, Oliver E. Diaz, Jr. was granted a TRO from the Chancery Court of Harrison County, Mississippi ("TRO #2") (Pet. App. 57a). On Sunday, November 5, 2000, Billy Joe Landrum was granted a TRO from the Chancery Court of the First Judicial District of Jones County, Mississippi ("TRO #3") (Pet. App. 60a). On Monday, November 6, 2000, Circuit Justice Antonin Scalia stayed TRO #1 (Pet. App. 5a). The same day, William A. Pyle, who was aware of Justice Scalia's stay of TRO #1 (Pet. 10), applied for and received a TRO from the Chancery Court of the First Judicial District of Hinds County, Mississippi ("TRO #4") (Pet. App. 62a). The Chancery Court that granted TRO #4 was aware of Justice Scalia's stay of TRO #1 as well (Pet. 10). Justice Scalia also stayed TRO #2 and TRO #3 on Monday, November 6, 2000 (Pet. App. 6a). On Tuesday, November 7, 2000, Justice Scalia stayed TRO #4 (Pet. App. 7a).

acting through Circuit Justice Antonin Scalia, then issued a series of stays of that TRO and three additional TROs (Pet. App. 2a-7a). Respondent confirms (at 10 n.7) what it terms the "unfortunate" fact that TRO #4, which was sought by Respondent's then-counsel, was issued in the face of this Court's first stay.

2. Respondent questions (at 6) whether the Petition challenges a final judgment, noting that the Mississippi Supreme Court's order was interlocutory in form and denied the stay without explicitly addressing Petitioner's simultaneously filed petition for interlocutory review.

a. Respondent does not deny, however, that TRO #1 and the Mississippi Supreme Court's ruling that the stay petition was "without merit" (Pet. App. 1a), gave Respondent all of the relief that he sought—suppression of Petitioner's speech until after the election. Respondent does not claim that he seeks any further relief or that there is anything more of substance to be done in the case. Nor could Respondent make such a claim since, in Respondent's view (refuted below), the entire case became moot and entirely unreviewable when the election occurred. Respondent does not deny that an order that grants the plaintiff all the relief he seeks is final. *See* Pet. 2 n.2.

b. Respondent notes (at 6) that the Mississippi Supreme Court failed to rule on the petition for interlocutory review. However, the purpose for that petition was to assure that the motion for stay would be considered if the Mississippi Supreme Court elected to view the TRO as nonfinal. By reaching and deciding the stay motion on the merits without addressing the request for interlocutory review, the Mississippi Supreme Court treated TRO #1 as final and, hence, rendered moot the petition for interlocutory appeal. Significantly, Respondent has never bothered to

respond to the petition during the six months since the stay was denied.[2]

3. Moreover, at issue here is a prior restraint on speech. Respondent acknowledges (at 7) that this Court repeatedly has reviewed temporary injunctions, even when the only action of the highest state court was to deny a stay. Respondent argues that, in such cases, this Court has focused its review on the propriety of the denial of the stay. That is an overstatement of the cases and, moreover, overlooks the truly final nature of the action challenged here. The two issues raised by the present petition both go to the propriety of the stay. The Petition contends that the Mississippi Supreme Court should have stayed the TRO (or reversed it outright) because (a) both on its face and when viewed in light of the supporting application, the TRO violated the First Amendment's prohibition of prior restraints, and (b) the TRO rested on a fundamental and obvious misunderstanding of the "express advocacy" standard under the First Amendment.

4. As an alternative to a claim that the Mississippi courts still are processing this case, Respondent asserts (at 9-11) that the case is moot. Respondent denies (at 10) that this Court's authority to review matters capable of repetition while evading review is implicated, arguing that the appeal of TRO #3 to the Mississippi Supreme Court demonstrates that review is available. However, *if this case is moot, then so is that*

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[2] Respondent concedes (at 5 n.2) that, on March 2, 2001, the Mississippi Supreme Court denied a motion to dismiss petitioner's appeal of TRO #3. The motion to dismiss was based on the same theory of non-finality that Respondent advances here. By rejecting those grounds, the Mississippi Supreme Court confirmed that the TROs were final, making moot any petition for interlocutory review. Respondent's assertion (*id.*) that the Mississippi Supreme Court is holding the petition for interlocutory review pending the outcome of that other case is unsupported, unexplained, and untenable. The fact is that that petition has been regarded (even by Respondent) as moot.

appeal. If this case is moot, then prior restraints issued in the last weeks or even months of an election regularly will escape review. Importantly, there is no reason to fear a lack of vigorous adversarial argument.[3] Respondent is represented by experienced counsel. The state of Mississippi has appeared through its Attorney General in support of Respondent, and other groups have indicated their intent to do likewise. Indeed, because this case arose from a judicial election, there is likely to be widespread interest and amicus participation.[4]

5. Seeking to turn a lemon into lemonade, Respondent argues (at 1, 4, 11-13) that the record is inadequate for review because it consists solely of "the uncontested factual allegations in affidavits from the respondent and his attorney." Respondent overlooks that the *Moore* opinion issued by the United States District Court for the Southern

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[3] Incredibly, Respondent asserts (at 9) that a denial of *certiorari* will not embolden trial courts who will be deterred from future TROs by "Justice Scalia's stay." Yet that stay did not receive much deference in Mississippi, even from Respondent's own counsel, as Respondent concedes (at 10 n.7). Respondent also asserts (at 12-13) that the Fifth Circuit appeal of *Moore* will solve any dispute. However, Mississippi's Supreme Court has made very clear that Mississippi courts are not subject to the Fifth Circuit. *Morrow v. Vinson*, 666 So. 2d 802, 805 (Miss. 1995); *Pearson v. Columbus & Greenville Ry. Co.*, 737 So. 2d 390, 397 (Miss. App. 1998).

[4] The need for Supreme Court review is underscored by the unique complexities inherent in elected judges reviewing cases that implicate their own or their colleagues' elections. Four of Mississippi's nine Supreme Court justices were up for election this last cycle, and the Chamber ran ads with respect to the races for all four seats. No doubt the Mississippi court has mechanisms for dealing with cases that affect the interests of a large number of justices. *E.g.*, *Public Employees Ret. Sys. of Miss. v. Hawkins*, No. 97-IA-01214-SCT, 2001 WL 324118 (Miss. Apr. 4, 2001) (appointment of a panel of five Special Justices to consider retirement benefits of former justices). Nonetheless, the state's institutions certainly will face unusual challenges.

District of Mississippi (Pet. App. 8a-33a), also is in the record and was relied upon in granting the TRO. The record is fully adequate to permit review of the two issues tendered by the petition.

a. To begin with, the fact that four prior restraints were issued with little evidentiary basis strongly underscores the need for this Court to clearly and firmly disapprove of such practice. This Court does not need to seek out a complex factual record and immerse itself in minutiae to be able to give clear guidance in this area. Nor, given typical TRO practice, is there any reason to expect that a longer record will present itself any time soon.[5] Indeed, demanding a more elaborate record would have perverse consequences. This Court and its Justices may grant stays of prior restraints only upon a conclusion that a grant of certiorari is likely. *See Edwards v. Hope Med. Group for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, Circuit Justice); *see also Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, Circuit Justice) (citing *Graves v. Barnes*, 405 U.S. 1201, 1203-04 (1972) (Powell, J., in chambers); *Mahan v. Howell*, 404 U.S. 1201, 1202 (1971) (Black, J., in chambers) for the proposition that "it must be established that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari"). If this Court were to confine its review to prior restraints that are supported by a voluminous record, state courts and practitioners considering a prior restraint would have a strong incentive to act upon as little evidence as possible, thus thwarting this Court's ability to grant a stay.

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[5] The record on appeal of TRO #3 to the Mississippi Supreme Court is no more developed than the present record. Respondent does not assert otherwise. Moreover, that stay was issued without reasonable notice and relied upon a different state statute. In addition, the federal issues raised here may not even be addressed in that appeal. The two cases have their own separate foci, this case on federal issues, the other on local practice questions.

b. The second issue presented here is a pure question of law—whether the theory of "express advocacy" announced in *Moore* and adopted as the fundamental predicate for the TRO conforms to the holdings of this Court.[6] No detailed facts are needed to decide that question. All that is necessary is to lay *Moore*'s analysis, which was adopted by the Chancery Court, alongside this Court's precedent. *Moore* recites the facts in some detail. Respondent complains (at 4, 12) that the record here contains only *Moore*'s descriptions of the Chamber's ads, rather than actual copies. Respondent does not allege that *Moore*'s descriptions are inadequate or inaccurate. But beyond that, the ads were widely disseminated. Copies are on file in the *Moore* record, and this Court may take judicial notice of the ads. *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 157 (1969); *National Fire Ins. Co. v. Thompson*, 281 U.S. 331, 336 n.1 (1930) (cases cited therein). Indeed, at the request of either Respondent or this Court, Petitioner will lodge videotaped copies.

6. Respondent argues that the prior restraint issued here is unique, and does not merit this Court's attention. Respondent asserts (at 2) that the TRO was based on a "definitive" federal court ruling, the *Moore* opinion. This argument is untenable. The *Moore* opinion was clear that it rested on a minority view of the law and, indeed, on a view that had been rejected by "the First, Second, Fourth, and Eighth Circuits" (Pet. App. 23a). Needless to say, that theory had no support in Mississippi jurisprudence. Thus, even if *Moore* had been a final judgment, other courts could not fairly regard its conclusions as "definitive."

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[6] An *amicus* brief submitted by certain organizations from Ohio further confirms the existence of widespread legal confusion on this point. *See* Motion For Leave To File And *Amici Curiae* Brief Of Alliance For Democracy And Common Cause/Ohio Respecting Certiorari.

7. Moreover, *Moore* did not reach the conclusion that Respondent cites. Respondent claims (at 3) that *Moore* established that the Chamber had "purchased advertising in amounts far exceeding the corporate amounts permitted under Mississippi law." This simply is not so.

a. To begin with, *Moore* quite clearly did not purport to decide that the Chamber was subject to any spending limit or had violated any spending limit. The defendants in *Moore* contended only "that these advertisements constitute '*independent* expenditures' subject to the *reporting* requirements of Mississippi Code Annotated §§ 23-15-801(j) and 809" (Pet. App. 12a, 17a) (emphasis added). *Moore* ruled only that the Chamber's ads were the type of speech that would require it to comply, at some point, with Mississippi's registration and disclosure requirements (Pet. App. 33a). *Moore* concluded that the Chamber's speech was of the type *regulated by Mississippi law, but it never concluded that the speech violated any requirement of Mississippi law* (*Id.*).

b. Indeed, contrary to Respondent's claim, Mississippi law imposes no limit on spending by corporations for *independent* political speech, even if the speech contains express advocacy.[7] For such independent speech, Mississippi requires only registration and disclosure. Indeed, the Mississippi Attorney General has flatly stated as much. *See* Brief Of The State Of Mississippi, *Amicus Curiae*, In Opposition To The Petition For Writ Of Certiorari at 8.[8]

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[7] Respondent cites (at 3) Mississippi Code Annotated § 23-15-1021, concerning elections to judicial office. That provision limits direct and indirect contributions (Pet. App. 47a). Respondent also cites (at 3) § 97-13-15, which restricts "political contributions by corporations" (Pet. App. 47a). As this Court knows, independent expenditures are much different than contributions. *See Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976).

[8] In the pending appeal to the Fifth Circuit from the *Moore* ruling, Mississippi's Attorney General explicitly states in his brief (at 17) that "independent expenditures are not subject to a dollar limitation."

Moore expressly noted that the Attorney General and Secretary of State did not question that the Chamber's spending was independent (Pet. App. 9a). No contrary evidence was submitted in support of the TRO. Respondent's assertion (at 13) that Petitioner "has not disputed in this Court" that it "far exceeded" Mississippi in spending limits is both inaccurate and misleading, in that no such limits apply to independent corporate speech.

c. The TRO here was not limited to particular ads that had been held to be subject to a spending limit. It forbade airing any "television advertisement, which is paid for or produced by the Chamber . . . concerning the Central District election" (Pet. App. 4a). Even if the Chamber were foreclosed from further "express advocacy," there was no basis for forbidding other non-express ads, should it choose to air them. In short, the entire issue of spending limits is irrelevant.

8. But more importantly, now that this Court has held in *Buckley* that political speech may be regulated in limited ways, it is vitally important for this Court to make clear that prior restraints are not a proper control mechanism. If a threat to the national security is not generally sufficient to justify a prior restraint on speech that will disclose material pilfered from the government, *New York Times Co. v. United States*, 403 U.S. 713 (1971), the risk that a speaker might pay for too much political speech cannot suffice.

CONCLUSION

The Petition properly presents two important legal issues that merit this Court's review. Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

May 3, 2001

SUPREME COURT OF THE UNITED STATES
Mr. Justice Antonin Scalia
Circuit Justice for the Fifth Circuit

(6)

No. 00A406

00-1255

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

FRANK G. VOLLOR,
OLIVER E. DIAZ, JR.,
and
BILLY JOE LANDRUM
Respondents.

FILED
NOV 6 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPPLEMENT TO MOTION FOR EMERGENCY STAY OF A PRIOR RESTRAINT ON POLITICAL SPEECH

Petitioner hereby supplements the Motion for Emergency Stay of a Prior Restraint on Political Speech ("Emergency Motion") that it delivered to the Supreme Court on Saturday, November 4, 2000 (which motion may not be officially filed until Monday, November 6). This Supplement

18 pp

advises the Court that two other candidates for seats on the Mississippi Supreme Court have obtained *ex parte* orders essentially identical to the order granted to Judge Vollor on November 3, 2000. Accordingly, this Supplement seeks emergency relief against the two new prior restraints for the same reasons discussed in the Chamber's Emergency Motion, and names the candidates who obtained the new prior restraints as party respondents.

The *Ex Parte* Prior Restraint Obtained By Judge Diaz

1. On Saturday, November 4, the Chancery Court of Harrison County, Mississippi, acting *ex parte*, entered a Temporary Restraining Order against the Chamber and several television broadcasting stations that imposes a prior restraint on Chamber political advertisements "in support of Keith Starett and against Oliver E. Diaz, Jr., concerning the Southern District election for the Supreme Court of Mississippi." A copy of the TRO and of the application therefor are Exhibit 5 hereto.[1]

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[1] The Application omits two of its exhibits. Exhibit A corresponds to the Memorandum Opinion that is included in Exhibit 3 to the Chamber's Emergency Motion. Exhibit B is the TRO obtained by Judge Vollor that is Exhibit 1 to the Chamber's Emergency Motion.

2. The Diaz Application (§ V.) describes the events leading to the Vollor prior restraint as "an identical proceeding," and states that the targeted ads are "virtually identical" to those enjoined by Judge Vollor. So far as appears, no further information about any particular Chamber ad was submitted in support of the Application, with the exception of a description of the "Judge Keith Starrett Advertisement" that appears at page 7 of the Memorandum Opinion of the Southern District (Exhibit __ to the Chamber's Original Motion). The Chamber understands the prior restraint to encompass that ad, and any similar ads. Television station defendants similarly understand the prior restraint to require them to take down the Chamber's ads relating to either Judge Diaz or his opponent, Judge Starrett. The ads have been taken down because of the prior restraint.

4. Time does not permit the Chamber again to seek relief from the Mississippi Supreme Court, on which Judge Diaz sits. That Court's November 3 ruling denying the Chamber's attempt to stay the Vollor TRO as without merit demonstrates that an application with respect to the TRO obtained by Judge Diaz would be futile.

5. Judge Diaz is one of three candidates for the same seat. The Chamber believes it is likely that there will be a run-off election in that race, with the run-off vote to be held on November 21. The Chamber will run ads during the run-off period if permitted to do so.

6. The Chamber asks that the prior restraint obtained by Judge Diaz be stayed for the same reasons stated in its original Emergency Motion with respect to the November 3 TRO concerning the Vollor race. The Chamber is serving both its original Emergency Motion and this Supplement on Judge Diaz and has named him as a respondent.

The *Ex Parte* Prior Restraint Obtained By Judge Billy Joe Landrum

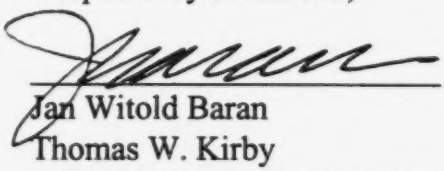
7. As this Supplement was being finalized, the Chamber was informed by telephone that yet another *ex parte* prior restraint against its political speech. The new TRO was obtained by Judge Billy Joe Landrum, who also is a candidate for a seat on the Mississippi Supreme Court. On information and belief, it was obtained in similar circumstances and imposes similar restraints to the TROs obtained by Judges Vollor and Diaz.

8. If a copy of that prior restraint can be obtained promptly, it will be attached hereto as Exhibit 6. Otherwise, it will be submitted later.

Conclusion

The two new prior restraints should be stayed for the same reasons stated in the Chamber's original Emergency Motion with respect to the November 3 TRO concerning the Vollor race. The Chamber is serving both its Emergency Motion and this Supplement on Judge Diaz and will serve Judge Landrum as soon as his counsel can be identified.

Respectfully submitted,



Jan Witold Baran
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Counsel for Petitioners

Of counsel:

Michael B. Wallace
PHELPS DUNBAR, LLP
Suite 5000 Sky Tel Centre
200 S. Lamar St.
Jackson, Mississippi 39225

November 5, 2000

CERTIFICATE OF SERVICE

I certify that on November 5, 2000, before 7:00 p.m. a.m., I caused a copy of the foregoing Supplement to be faxed and mailed to counsel for respondents at the addresss and fax numbers shown below. A copy of the original Emergency Motion also was faxed to counsel for Judge Diaz. I also gave telephone notice at the office numbers shown below. If home telephone numbers can be obtained, I will give notice to those numbers as well. Judge Landrum will be similarly served as soon as his counsel is identified.

Paul Kelly Loyacono
PO Box 1150
1025 Jackson St.
Vicksburg, MS 39181

Fax: (601) 638-8296
Ph: (601) 638-8282

Joseph A. Lococo
LOCOCO & LOCOCO
PO Box 6014
D'Ivberville, MS 39532

Fax: (228) 392-3890
Ph. (228) 392-2799

Thomas W. Kirby

EXHIBIT 5

Twst / 11-4-00 2:3[illegible] pm

IN THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI

OLIVER E. DIAZ, JR. **PLAINTIFF**

VERSUS **CAUSE NO. _____**

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WLOX-TV, GULFPORT/BILOXI, MS; WDAM-TV, HATTIESBURG, MS **DEFENDANTS**

TEMPORARY RESTRAINING ORDER

CAME the Applicant, Oliver E. Diaz, Jr., through counsel and by affidavit as required by Rule 65 MRCP, and the Court, having heard the argument of counsel and being advised in the premises, including the affidavits of the Applicant and his counsel, finds that the relief sought should be granted. The Court find, orders and adjudges as follows:

1. The Court finds that it has jurisdiction for the purposes of a Rule 65 motion.

2. The Court notes that Plaintiff's counsel contacted this judge on Saturday afternoon and that the Court, having heard the ex parte motion, was able to contact 3 of the district's four Chancellors and discuss the merits of the application; further, the Court believes there is sufficient merit to the injunction application to issue this order.

3. The Court grants this order without notice because there is insufficient time to notify all parties and schedule a hearing for the following reasons: Plaintiff has alleged a failure to comply with Mississippi Election Laws by the Defendant, the Chamber of Commerce of the United States of America ; Plaintiff has alleged litigation in federal courts to decide the question of whether Defendant Chamber of Commerce was subject to

BEST AVAIL

Mississippi Election Laws regarding contributions was not decided by the Court of its choosing until November 2, 2000, only two business days prior to the election.

4. The Court finds that Plaintiff has alleged that irreparable and immediate harm would accrue to Oliver E. Diaz, Jr., as his campaign would be subject to unfair television advertisements in support of his opponent, Keith Starrett, contrary to Mississippi Election Laws due to the shortness of time remaining before the election and his inability to lawfully match the financial contributions of television advertising of the Chamber of Commerce of the United States of America on behalf of his opponent.

IT IS THEREFORE, ORDERED AND ADJUDGED AS FOLLOWS:

1. ORDERED AND ADJUDGED, that each of the Defendants, their agents, servants, and employees are hereby enjoined from transmitting any television advertisement, which is paid for or produced by the Chamber of Commerce of the United States of America, its agents, servants, or employees, in support of Keith Starrett and against Oliver E. Diaz, Jr., concerning the Southern District election for the Supreme Court of Mississippi. Specifically, Separate Defendant WDAM-TV, Hattiesburg, Ms., is enjoined only as to television transmission into Harrison County, Hancock County, and Stone County, all within this Court's district.

2. ORDERED AND ADJUDGED, that the Applicant is hereby required to post with this Court a bond in the amount of One Thousand Dollars ($1,000.00), and this Order shall be immediately binding on the parties on the 4th day of November, 2000, as of 2:30 p.m., and service upon each Defendant may be had herein by mail, telephone, facsimile, or by actual notice otherwise.

ABLE COPY

3. ORDERED AND ADJUDGED, that the Court sets this matter for review on Monday, November 6, 2000, at 1:30 p.m., at the Gulfport Courthouse, should any Defendant feel aggrieved by this injunction; however, unless therein set aside, this Order shall expire ten (10) days after entry or after further Order of this Court pursuant to Rule 65.

SO ORDERED, this the 4th day of November, 2000, at 2:30 p.m.

CHANCELLOR

IN THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI

OLIVER E. DIAZ, JR. **PLAINTIFF**

VERSUS **CAUSE NO. _____**

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; WLOX-TV, GULFPORT/BILOXI, MS; WDAM-TV, HATTIESBURG, MS **DEFENDANTS**

APPLICATION FOR TEMPORARY RESTRAINING ORDER

COMES NOW the Plaintiff, Oliver E. Diaz, Jr., and applies for a Temporary Restraining Order against the above-named Defendants, and in support of his application for a Temporary Restraining Order would show unto this Court the following:

I.

The application involves the contracting between the Chamber of Commerce of the United States of America, hereinafter referred to as "Chamber", and the other defendant television stations. The defendant television stations have as their principal place of business the Southern Judicial District of the State of Mississippi, wherein an election is being contested for a seat on the Mississippi Supreme Court between Judge Billy Joe Landrum and Judge Keith Starrett, and Oliver E. Diaz, Jr., your Plaintiff herein.

II.

In the absence of immediate equitable relief there will be irreparable harm to the Plaintiff. With every transmission or communication of television advertising paid for by the Chamber, public opinion is being affected and voting decisions by the viewers of those illegal advertisements are being determined. The election day is November 7, 2000.

III.

The television ads on behalf of Judge Keith Starrett and against Oliver E. Diaz, Jr. produced and funded by the Chamber of Commerce of the United States of America are indirect expenditures which are subject to the contribution limits and reporting requirements of Mississippi Code Annotated, Section 23-15-801. (See the opinion of Honorable Henry T. Wingate, which is attached hereto as Exhibit "A".) The Chamber of Commerce of the United States of America has violated the spending limit provision of the Mississippi Election Laws which cap individual expenditures at $5,000.00 per person or $1,000.00 per corporation. The Chamber of Commerce of the United States of America is a non-profit corporation which operates in Washington, D.C.

IV.

That upon a further evidentiary hearing for a preliminary injunction, there is an overwhelming likelihood that this Court will also find these expenditures illegal and, thus, grant the relief sought herein. On November 2, 2000, the United States District Court, U.S. District Judge Henry T. Wingate, filed its Memorandum Opinion and Order. That Order ruled that the advertisements on behalf of Judge Jim Smith clearly express advocacy and are offensive under applicable law, *Buckley v. Valeo*, 424 US 1, 96 Sup. Ct. 612 (1976) Judge Wingate found that the Defendant, Chamber, was subject to Mississippi Election Laws concerning television ads communicated in that particular Supreme Court race between Judge Frank Vollor and Judge Jim Smith.

V.

In an identical proceeding, the Circuit Court of the First Judicial District of Warren County, William Singletary, Chancellor, enjoined Central District TV stations from running

virtually identical ads against Judge Frank Vollor illegally funded by the Defendant, Chamber, a copy of said order is attached hereto as Exhibit "B".

VI.

A Motion to Stay the Temporary Restraining Order filed by the Chamber was denied by a three (3) Judge panel of the Mississippi Supreme Court on November 3, 2000.

VII.

The Plaintiff, Oliver E. Diaz, Jr., is asking this Court for the immediate enforcement of Mississippi Election Laws. The relief sought is narrowly crafted in order to achieve the proper legal result and constitutes the least restrictive means to bring the Chamber of Commerce of the United States of America into compliance with Mississippi law and enjoin its continued violation of Mississippi Election Law. Those television and communication defendants who contracted with the Chamber or its agents, servants, and employees to communicate this illegal advertising should also be enjoined from accepting these ads or communicating these ads in any way to the public by any method of transmission.

VIII.

This Court should immediately enter its Order enjoining the Chamber of Commerce of the United States of America and all other defendant television stations from airing those television commercials being aired and paid for by the Chamber in support of Judge Keith Starrett or against the election of Judge Oliver E. Diaz, Jr. This Order should go into effect immediately, without further delay or immediate and irreparable injury, loss, and damage will result to Oliver E. Diaz, Jr., your Applicant herein, before the adverse parties or their attorneys can be heard in opposition. (See Affidavit of Oliver E. Diaz, Jr., which is attached hereto as Exhibit "C".)

IX.

The Defendant, Chamber, has created this emergency time constraint because of its failure to comply with Mississippi law and then its application to the United States District Court for Declaratory Relief, which was just issued on November 2, 2000, as shown by attached exhibit.

X.

The Affidavit of the Attorney for Applicant is attached hereto as Exhibit "D" and made a part hereof, as required by Rule 65 MRCP.

XI.

There will be no loss to the Chamber, the primary Defendant, and there can be no loss to the communication defendants for being restrained from running ads not in compliance with or in violation of Mississippi Election Laws. In any event, only a minimal bond should be required.

XII.

For these and other reasons orally presented to the Court, the within relief should be granted without note.

RESPECTFULLY SUBMITTED, this the 4th day of November, 2000.

JOSEPH A. LoCOCO
MISSISSIPPI BAR #9537
LoCOCO & LoCOCO
POST OFFICE BOX 6014
D'IBERVILLE, MS 39532
Telephone: 228-392-2799

AFFIDAVIT OF OLIVER E. DIAZ, JR.

STATE OF MISSISSIPPI

COUNTY OF HARRISON

PERSONALLY APPEARED BEFORE ME, the undersigned, after having been duly sworn, Oliver E. Diaz, Jr. states as follows:

1. That I am an adult resident citizen of Harrison County, Mississippi.
2. That I am presently a candidate for a seat on the Mississippi Supreme Court from the Southern District of Mississippi and that I am opposed in that election by Judge Billy Joe Landrum and Judge Keith Starrett.
3. That presently there are being run various television advertisements in support of Judge Keith Starrett and against your Affiant, Oliver E. Diaz, Jr., which are being paid for by the Chamber of Commerce of the United States of America, hereinafter referred to as "Chamber."
4. That the chamber has violated Mississippi Election Laws, particularly Section 23-15-801, Mississippi Code Annotated, primarily with regard to contribution limits and reporting requirements.
5. That the Chamber has continually violated the spending limit, which limits each individual expenditure to five thousand dollars ($5,000.00) per person or one thousand dollars ($1,000.00) per corporation.
6. That the illegal spending by the Chamber is vastly prejudicial to the changes of election of the Affiant, who has obeyed all of the election and reporting laws of the State of Mississippi. This "last minute" Application for Temporary Restraining Order is made necessary by the failure of the Chamber to obey Mississippi Election Laws; and this matter was decided by the U. S. District

EXHIBIT
C

court for the Southern District of Mississippi on November 2, 2000, which ruled that Mississippi Election Law did apply to the Chamber in this instance.

7. Your Affiant is asking this Court to require enforcement of Mississippi Election Laws and to enjoin the Chamber and the defendant television stations from continuing to violate the laws by running the chamber ads concerning the supreme Court race between this Affiant, Judge Billy Joe Landrum and Judge Keith Starrett.

8. The matters contained in the application for Temporary Restraining Order are true and correct to the best of my knowledge and belief as set out therein by my attorney.

9. If this Temporary Restraining Order is not granted, my chances in this election will be greatly harmed because of the illegal actions of the Chamber and the contracting television defendants. The election is just two (2) business days after the rendition of the Order of the U.S. District Court concerning this matter brought by the Chamber.

10. FURTHER AT THIS TIME, AFFIANT SAYETH NOT.

WITNESS MY SIGNATURE, this the 4th day of November, 2000.

OLIVER E. DIAZ, JR.

SWORN TO AND SUBSCRIBED BEFORE ME, this the 4th day of November, 2000.

NOTARY PUBLIC

My Commission Expires:

10/26/02

RULE 65 AFFIDAVIT OF ATTORNEY

STATE OF MISSISSIPPI

COUNTY OF HARRISON

1. I, Joseph A. LoCoco, am attorney for the Plaintiff in the application of Oliver E. Diaz, Jr. for a Temporary Restraining Order.

2. The list of television stations in my possession has only the address and general manager and I do not know the attorney for the Chamber of Commerce of the United States of America or its address, except Washington, D.C, but believe their attorney is Mike Wallace. Efforts to contact him at his office have been unsuccessful.

3. That I was furnished on this date with the Order signed by U.S. District Court Judge Henry T. Wingate, who found that the Chamber of Commerce of the United States of America was subject to the election laws of this State.

4. That there is no time to notify all Defendants, as the Order of Judge Wingate was signed November 2, 2000, and it was the Chamber of Commerce of the United States of America which brought the Action for Declaratory Relief in his Court. There are remaining only one (1) business day until the election of November 7, 2000.

5. Notice should not be required because this immediate relief is made necessary by the failure of the Chamber of Commerce of the United States of America to abide by Mississippi Election Laws. The Chamber of Commerce of the United States of America had filed for Declaratory Judgment on the question of whether it was subject to Mississippi Election Laws, and it chose the time and forum for that

EXHIBIT
D

decision, which was just rendered on November 2, 2000 by the U. S. District Court for the Southern District of Mississippi.

6. The cause of there not being adequate time for notice is only the fault of the Defendant, the Chamber of Commerce of the United States of America, and at no fault of the Plaintiff, Oliver E. Diaz, Jr., or his attorney.

WITNESS MY SIGNATURE, this the 4th day of November, 2000.

JOSEPH A. LoCOCO

SWORN TO AND SUBSCRIBED BEFORE ME, this the 4th day of November, 2000.

NOTARY PUBLIC

My Commission Expires:

10/26/02